No. 3953

In The United States Circuit Court of Appeals

For The Ninth Circuit

FORBES P. HASKELL, as Receiver of SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, et al., *Appellants*,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al., *Appellees*.

TACOMA MILLWORK SUPPLY COMPANY, a Partnership consisting of ANN DAVIS and R. T. DAVIS, Jr., as Executors of the Estate of R. T. DAVIS, Deceased, R. T. DAVIS, Jr., LLOYD DAVIS, HARRY L. DAVIS, GEORGE L. DAVIS, MAUDE A. DAVIS, MARIE A. DAVIS, RUTH G. DAVIS, HATTIE DAVIS TENNANT and ANN DAVIS, *Appellants*,

vs.

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McCLINTIC-MARSHALL COMPANY, a Corporation, and E. E. DAVIS & CO., a Corporation, and FAR WEST CLAY COMPANY, a Corporation, *Appellants*,

vs.

ANN DAVIS and R. T. DAVIS Jr., as Executors of the Estate of R. T. DAVIS, Deceased, et al., *Appellees*.

WASHINGTON BRICK, LIME & SEWER PIPE COMPANY, a Corporation, *Appellant*,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al., *Appellees*.

BEN OLSON COMPANY, a Corporation, *Appellant*,

vs.

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J. P. DUKE, as Supervisor of Banks of the State of Washington, and as successor in office of the defendant CLAUDE P. HAY, as State Bank Commissioner of the State of Washington, FORBES P. HASKELL, Jr., as Deputy Supervisor of Banks of the State of Washington, and SCANDINAVIAN AMERICAN BANK OF TACOMA, a Corporation, *Appellants*,

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UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANT TACOMA MILLWORK SUPPLY CO.

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THE ARGUS PRESS, SEATTLE

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UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANT TACOMA MILLWORK SUPPLY CO.

STATEMENT OF FACTS

This action is one begun primarily for the foreclosure of a lien held and claimed by the McClintic-

Marshall Company, plaintiff below, against the Scandinavian American Building Co., which was in process of erecting in the interest of the Scandinavian American Bank a building in Tacoma, Washington, on three lots, two of them for a long time owned by the Scandinavian American Bank, one of them purchased from one Chas. Drury, an officer and director in the bank.

The plaintiff McClintic-Marshall Company was joined in this proceeding by the appellant Tacoma Millwork & Supply Company, a partnership consisting of Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, Deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, which sought the foreclosure of its liens, one for material, another for work of erection, a third for bank fixtures and a fourth for door bucks on open account. There were other minor items such as extras and bond which will be explained later.

There are numerous lien claimants who were thereafter either made parties defendant or came in as intervenors.

Resume of Transactions by the Bank and Building Company.

In order to better understand this situation it is well to detail briefly, a history of the transactions between the bank and the building company, which affect the parties to this litigation. The

specific facts on which this recital is based will appear with proper pagings from the Transcript of Record later on in this brief.

Sometime in 1919 the officers of the Scandinavian American Bank formed the Scandinavian American Building Company for the sole purpose of constructing a building upon property it then owned, namely, Lots 11 and 12 Block 1003, Map of New Tacoma, W. T., and upon what is known as the Drury lot, namely, Lot 10 in the same block, then belonging to Mr. Chas. Drury, the Chairman of the Board of Directors of said bank. The trustees of the Scandinavian American Bank and the Scandinavian American Building Company were practically identical. The parties who particularly formulated the policy of the bank and the building company were Ole Larson and Chas. Drury, and, in fact, almost everything seems to have been left to Larson.

The bank purchased the entire capital stock of the building company. Its officers caused the building company to execute a first mortgage of $600,000 on the lots mentioned and the Bank entered into a specific agreement with the building company that the latter execute a second mortgage; issue $750,000 worth of bonds thereon, and grant over to the bank $350,000 worth of the said bonds for the purchase price of said lots 11 and 12. The Bank paid Drury through advances to the building company for lot 10 and the building company was to retain $400,000 of said bonds for building pur-

poses. The $600,000 was also to be devoted entirely to building purposes.

Contracts were thereupon entered into with the various parties to this litigation and others. In obtaining said contracts Larson and others connected with them represented that they had $400,000 cash on hand and that the $600,000 mortgage money had been definitely arranged and was monies with which to complete the building, and that the property was otherwise free and clear, and by such representations among others obtained a waiver of lien from most of the contracting parties.

The building company did not have a cent of money when these representations were made. There had been no definite commitment by the Metropolitan Life Insurance Company, which was to furnish the $600,000. The various parties waiving their liens were wholly misled by these representations. The bank closed its doors January 15th, 1921. The building company had been financed entirely out of bank funds and work immediately ceased and these suits followed.

In substance, so far as this appellant is concerned the real issue on appeal is this—

Appellant's material was all specially designed and specially fabricated, costly mahogany and other high grade mill work. It was 90 per cent completed when the building company failed. It was kept in storage at the request or with the consent of the building company—away from the building under

construction. That this was necessary owing to the fact that rain would mar this work. The trial court held that under our statutes no lien could be given unless delivery was made on the premises.

Owing to the fact that time will not permit of a reply brief we will submit other matters that may affect issues which we believe are of minor importance in our controversy.

Shortly after the commencement of this action one Forbes P. Haskell was made receiver of the Scandinavian American Building Co. He had already been placed in charge of the Scandinavian American Bank as a special deputy supervisor of banks of the State of Washington, J. P. Duke, being the supervisor at this time and successor of Claude P. Hay, during his period designated State Bank Commissioner of the State of Washington.

Mr. Haskell in his official capacity as receiver, of course represented all creditors of the Scandinavian American Building Co., and in his official capacity as Special Deputy Supervisor of Banks in charge of the liquidation of the Scandinavian American Bank at Tacoma, appears in this cause seeking to have placed prior to these lien claimants a mortgage hereafter designated the Penn-Mutual mortgage of $70,000.00, which he voluntarily paid as liquidator of said bank and which, in effect, was owing by the bank. On the other hand he is seeking the foreclosure of a mortgage designated as the Metropolitan-Simpson mortgage so-called hereafter,

of $600,000 which the building company had executed to obtain building funds.

The evidence from the record now follows:

Unity of Bank and Building Company.

The building company was but an entity created by the bank for its own purposes. The following stockholders, trustees and officers of the bank subscribed to one share of stock each: Lindberg, Drury, Lindeberg, and Williamson. (Record p. 1256.) The minute book further recites that on the 25th day of November, 1919, Chilberg, Lindberg, Drury, Larson and Williamson were present as trustees, Chilberg being elected temporary Chairman, and Larson temporary Secretary. The officers elected were: Drury, president; Lindberg, vice-president; Sheldon, secretary, and Ogden, treasurer. The bank's officers at that time were Larson, president; Lindberg and Sheldon, vice-presidents, and Ogden, Cashier. The trustees of the bank were Lindberg, Drury, Williamson, Sheldon, Johnson, Lamborn and Larson (Record pp. 1102-03). Mr. Chilberg was president of the Bank during this year (Record p. 1137).

Larson, the vice-president of the bank, subscribed to all of the remaining stock in the building company, on behalf of the Bank as he says. On June 25th, 1920, the bank purchased all of the stock of the building company, giving it credit on the books of the bank for $200,000. (See exhibit 234, Record p. 1119.) While this account was carried

directly as a stock purchase until December 31st, 1920, O. S. Larson, the president, then attempted to transmute this purchase into a loan of $200,000 to the building company. (Record p. 1119), and under the entries of December 31st, 1920, for the first time, interest is charged upon this account.

Larson and Drury the Active Forces in Both Bank and Building Company.

The matter of building this building and, in fact, the management of the bank was left almost entirely, in the sense of directing all policies involving these two matters, to Mr. Larson, actively assisted by Mr. Drury. (Record p. 1125.)

Gustave Lindberg subscribed to one share of stock and stated he had no time to serve; that during the period the contracts were let by the building company he had nothing to do with them. That Drury was very active; that he, Lindberg, signed the articles but never attended the meetings; that he first found out that the bank had purchased the stock of the building company after the bank was closed; that he left these matters to Mr. Drury and paid no attention to them.

George Williamson, a trustee of the bank and a trustee of the building company, says that Mr. Drury seemed to be the active head; that Mr. Larson had most of the dealings with Mr. Simpson; that he resigned from the bank on finding out, May 7th, that a loan had been made to the building

company. That he knew nothing of the purchase of the stock by the bank until after January 8th, 1921. Says that he continued nominally as a director until after the 8th of January, 1921. (Record p. 978.) That all he knew about the financial arrangement was that it was represented that the building was financed outside of the bank, that statement being made by Mr. Larson and Mr. Drury to the Board of Directors of the bank many times. (Record p. 988.) That he understood that Mr. Larson and Mr. Drury were acting in conjunction with Mr. Simpson and Mr. Webber. He had no knowledge of the assignment by Simpson to the bank of the $600,000 mortgage. (Record p. 1025.)

Chilberg testified (Record p. 1136) that he never knew that the bank had to put up any money to carry the building and did not know of the Simpson mortgage at that time. There was to be an interim loan but he had nothing to do with that and did not take an active interest in the construction or financing of the building. He was not an officer or director of the bank in 1920. He was not present when Mr. Larson subscribed for the bulk of the stock in the building company and does not know whether it was done. He was still president of the bank November 24th, 1919, and does not know that he was ever a director of the building company. He was a director in the bank. (Record p. 1137.) He was apparently one of the incorporators of the building company. He subscribed to only one share of the stock and never qualified. (Record p. 1138.)

He didn't remember hearing about an individual bond from the directors, required by the tentative commitment by the Metropolitan Life Insurance Company (Ex. 1037). He didn't know of any authority by the bank to Mr. Larson to subscribe to the balance of the stock in the building company, namely: $199,600 worth. (Record p. 1141.) Mr. Larson was vice-president and manager of the bank and he and Mr. Drury were active in furthering the building project. Mr. Larson and the other gentlemen at Tacoma were active in handling these things. He was not even in Seattle but very little of the time. (Record p. 1142.)

James R. Thompson says, I was director and stockholder in the bank in the year 1919. I met Mr. Williamson, Mr. Drury and Mr. Larson in the Plaza Hotel (New York) and discussed with them the proposed building. (Record p. 1147.) It was my impression all of the time that I was a director that the financing would be done outside of the bank. I did not qualify or accept a position as trustee of the building company. I was very sick during 1920 and did not know I was a director until after the bank had closed. I had no information that Larson was authorized to sign for the balance of the stock in the building company. I never heard of it. (Record p. 1148). I know nothing about the letting of the building plans or the actual plans. I have only a hazy impression of how the matter was to be financed. I am satisfied that Mr. Larson did run the whole matter and

nobody else had much to do with it while I was connected with the bank. (Record p. 1150).

J. V. Sheldon was a trustee of the bank from January 27th, 1920, on, and was assistant cashier in 1919 and vice-president from January 27th, 1920, on. Larson told him that the building would be financed entirely outside of the bank. (Record p. 1153). That I complained in April, 1920, about the bank advancing any money. That Mr. Drury first mentioned taking an assignment of the $600,000 mortgage and insisted upon it. (Record p. 1154.) That Larson told me that he was going to get an assignment from Simpson to the bank about June, 1920. (Record p. 1157.) I first learned of the stock purchase after June 25th, 1920. I mentioned it to Mr. Larson and I was never consulted as a trustee in reference to the purchase of this stock and had no knowledge of it until I discovered it a few days after June 25th, 1920. (Record p. 1159).

M. M. Ogden says, I was cashier of the bank during this time. With reference to the making of the loans, the loan of November 8th for $100,000 and $50,000 were not put before the board. The one of December 8th, of $50,000 was not put before the board. There was an authorization on April 9th and May 7th for $25,000 each. (Record pp. 1027-28). Mr. Larson did not take up the question of advances to the building company while he was president. The assignment of the mortgage was not taken up at a board meeting. I did not

know until long after June 25th, 1920, that the bank had purchased the stock of the building company. (Record p. 1029). I know nothing about the reason for taking over the assignment from Simpson. (Record p. 1033).

O. S. Larson was vice-president of the bank in the times in issue until January, 1920, when he became president and remained so until its liquidation (Record p. 1035), and was a director of the building company. That he and Mr. Drury made the arrangements for the loan. I subscribed for the balance of the stock on behalf of the bank. (Record p. 1042). The trustees in the building company were all directors of the bank. This was so that the bank could control the building company. Immediately upon receiving my stock certificate I endorsed it to the bank.

I arranged for the assignment from Simpson. (Record p. 1048). I never got any instructions from the trustees to obtain re-assignment of this mortgage to the bank to secure the bank for advances. (Record p. 1051).

Pages 1084-1085, *et sequor* of Record, show that Mr. Larson was the active force in both the building company and the bank. He says he told the bank commissioner that they would have to carry this building to completion before they could get any money from the Metropolitan Life Insurance Company. (Record p. 1085). The other directors never objected to my buying the stock of the building company. (Record p. 1052). I do

not believe it was ever brought up at a meeting of the stockholders, but it was brought up at a meeting of the trustees. (Record p. 1093).

He says that Mr. Simpson had no authority to make any representations, and that neither Mr. Drury nor he, Larson, ever gave him authority. (Record p. 1107). He says he had nothing to do with the building except as a representative of the bank.

Frank M. Lamborn says that he was a director during 1920 and until the closing of the bank. That he first found out that funds of the bank were being used in the building in the late fall of 1920. (Record p. 1172). That Larson several times told him that it had been fully financed. Mr. Drury, late in the fall, mentioned the fact that the advances were secured by mortgages or bonds and were absolutely safe. (Record p. 1172). I am not sure that I ever knew that the bank purchased $200,000 worth of the capital stock of the building company. My consent was never asked. Larson was manager and president of the bank and I had nothing to do with the building company at all. It was left in Mr. Larson's hands to make any advances and he would naturally handle those things. (Record p. 1173). I found out, not in official sense, but while I was director, that the McClintic company had a contract to furnish steel on the building. (Record p. 1174).

Miss Edith Carlson testified that the headquarters of the building company at that time were in

the Tacoma Hotel and I was secretary to Mr. Webber, the architect. Mr. Drury made certain representations to the contractors that $400,000 was on hand. (Record p. 1115).

It will be noted later that the offices of the building company were the personal rooms occupied by Mr. Larson at this hotel. (Record p. 705).

FINANCING BY BANK OF BUILDING COMPANY.

C. C. Sharpe says, I was bookkeeper for the Scandinavian American Building Company during the time in issue. The books show a deposit as of date of June 25th by O. S. Larson of $200,000, this entry being made from a deposit book which the bank would have. (Record p. 1111). My offices were down in the same building with the bank and I was part of the time in the bank and part of the time in the offices on the seventh floor where I kept the building company's books. (Record p. 1113). No promissory note covering the $200,000 purchase money was ever given me for entry on my books. The checks were signed by Mr. Sheldon, as secretary and Mr. Ogden, as treasurer, for the building company. (Record p. 114).

Claude P. Hay testified as follows: I am Deputy Supervisor of the Banking Department of the State of Washington. After March 20th, I was bank commissioner and prior to that I had been examiner. I was commissioner from March 1st, 1920, to April 1st, 1921. I had some talk with Mr. Larson with reference to the bank building. Mr. Larson

told me that Mr. Moore, the then commissioner, would not have any occasion to worry since he had financed the building in New York. (Record p. 1175). In the late fall of 1920 Mr. Larson and Mr. Drury came to Olympia to obtain permission to carry the building under certain conditions (Record p. 1177). Mr. Drury, Chairman of the Finance Committee of the Bank, told me that the money advanced was properly secured by a mortgage of $600,000, Mr. Larson joining him in this representation (Record p. 1178, see also p. 1180.) Even after August 23rd, 1920, Mr. Drury assured me that the Bank had not put any money into the building (Record p. 1181).

Samuel L. Morse was a teller in the Scandinavian American Bank. The back of the note card (referring to Exhibit 187) is in my hand-writing and I put that on there under Mr. Larson's instructions. This having reference to a memorandum note against real estate for $200,000 and Mr. Larson instructed us to make a memorandum note of $200,000 against real estate loans (Record p. 1185). The memorandum note was made up by myself and I signed it "Scandinavian American Building Company" and it was never signed by any officer of the building company (Record p. 1187).

C. C. Sharpe testified that the entries relating to the placing of interest charges in the building account with the bank were entered on the books of the Scandinavian American Building Company under Mr. Larson's directions (Record p. 1240).

I was directed to put them in the latter part of September. I took Mr. Larson's instructions because he was actively engaged in the building company's work and I also received instructions from Mr. Drury and other officers of the building company.

Mr. Larson practically, solely, and alone (unless Mr. Drury assisted) arranged for the financing of this building in the following manner:

He reached a tentative agreement with the Metropolitan Life Insurance Company through a broker named G. Wallace Simpson, under which without obligation and under conditions that were never complied with the Metropolitan Life Insurance Company offered to loan $600,000 on the building and site secured by a first mortgage.

The bank then passed certain resolutions to convey title to the building company with the understanding that the building company would execute the $600,000 mortgage which was to be and was recorded as a first mortgage. At this time there was of record the Penn-Mutual mortgage on which there was still due $70,000 and interest. The deed from the bank and from Drury whose lot was free and clear placed the fee simple title in the building company with a warranty on the part of the bank to clear the title so that the $600,000 mortgage would be a first mortgage. This was a direct agreement to pay the Penn-Mutual mortgage. As a counter agreement and as the consideration for the transfer of these lots the building company

agreed to execute a second mortgage securing second mortgage bonds in the amount of $750,000, of which it was to retain $400,000 and grant over to the bank in full payment of said lots as free and unencumbered, $350,000 of said second mortgage bonds.

(The resolutions just mentioned will be found at pages 1042, *et sequor*, Record. See also pages 1005, *et sequor*, Record.)

The tentative agreement referred to which Mr. Larson speaks of as a commitment, but which is wholly conditional, is found at pages 891, *et sequor*, Record. The latter portion of this agreement reads as follows:

> This letter shall be deemed merely a notice, and shall not be construed as an agreement to make said loan, or as imposing any obligation on this company to enter into a building loan agreement in respect thereto.
>
> "It is understood that the money for this loan is not to be advanced until the building is entirely completed and our architect can so certify, and our counsel can certify the property is free from liens which could affect our mortgage."

And another provision that must be noticed is that appearing at the top of page 983, as follows:

> "To guarantee the completion of said building and the removal of any liens which could take priority to our mortgage, as we are to receive the collateral bond of Messrs. Chas. Drury,

J. R. Thompson, George G. Williamson, J. E. Chilberg, Gustav Lindberg and Jafet Lindeberg. It is understood that these gentlemen are to be individually and collectively bound under obligation until the loan has been reduced to $500,000."

The last provision just noted was never complied with. The building itself is even now only partially completed.

Speaking to the resolutions relating to the financing of this building, there were present at the board meeting of the Scandinavian American Bank of February 10, 1920, Messrs. Drury, Lamborn, Johnson, Lindberg, Larson, Williamson and Ogden. At this meeting the transfer of Lots 11 and 12 in Block 1003, Map of New Tacoma, belonging to the bank, was considered (Record p. 1006). The value of the property was fixed at $350,000. The resolutions there duly adopted referred to "a first mortgage for the principal sum of $600,000 to be executed by said Scandinavian American Building Company upon all three lots" (Record p. 1008), and "a series of second mortgage bonds of the total par value of $750,000 to be executed and secured by a second mortgage on said premises," and the affirmative and pertinent part of the resolution now follows:

Now Therefore be It Resolved, that the President and Cashier of Scandinavian American Bank of Tacoma be and they are hereby authorized, directed and empowered to

execute and deliver to said SCANDINAVIAN AMERICAN BUILDING COMPANY a warranty deed of conveyance to said Lots 11 and 12, in Block 1003, "Map of New Tacoma, W. T." upon receiving from said SCANDINAVIAN AMERICAN BUILDING COMPANY a certificate or agreement agreeing to deliver to said SCANDINAVIAN AMERICAN BANK OF TACOMA, within four (4) months from the date hereof bonds of the par value of $350,000, bearing interest at 6 per cent per annum, payable semi-annually and running for a period of fifteen (15) years, which said bonds shall be secured by a second mortgage on the premises known and described as Lots 10, 11 and 12, in Block 1003, "Map of New Tacoma, W. T."

In this resolution (Record p. 1007) is found reference to the $70,000 Penn-Mutual mortgage as a present encumberance upon Lots 11 and 12, the Drury lot being known as Lot 10. The financing that occurred through the bank thereafter appears in Exhibit 185 (page 1026, Record) with this exception: That the credit through the purchase of the stock in the building company in the amount of $200,000 does not appear. Exhibit 190 shows this payment as a debit against stock and security with a contra-credit to the Scandinavian American Building Company of the same amount, namely, $200,000, as of date of June 25th, 1920. The deposit slip shows the credit to the Scandinavian American Building Company as of the same date,

namely, a check of $200,000 (Record pp. 1034-35).

The over-drafts are shown as follows:

May 10, 1920	$ 1,568.62
June 4, 1920	12,156.68
Sept. 22, 1920, about	47,000.00
Sept. 23, 1920, about	72,000.00
Oct. 14, 1920	118,401.78
Nov. 18, 1920	7,429.06
Dec. 15, 1920	6,552.37
Jan. 15, 1921	32,746.42

(Record p. 1111, testimony of C. C. Sharpe.)

Mr. Larson says that the bank was to pay off the $70,000 Penn-Mutual mortgage and then the building company was to pay $350,000 for the property, as already shown in second mortgage bonds, and the mortgage was then to be released (meaning the Penn-Mutual mortgage). The $600,-000 fund was to be used for final completion, and the building company could not get the money until the architects would certify that it was completed or could be completed (Record pp. 1049-50). I figured that the bank would have $350,000 worth of second mortgage bonds for the real estate. $350,000 worth of the second mortgage bonds were to be turned over to the bank for real estate (Record p. 1106). (Lots 11 and 12.)

Exhibit 350, a ledger sheet of the Scandinavian American Building Company, charges to site account $65,000, cost of the Drury lot, and $350,000 covering the double corner, or Lots 11 and 12 (Record p. 1242) and Exhibit 352 is a copy of the

original ledger sheet of the bank in account with the building company. Here again there is charged to the building company the cost of the Drury lot. (See also testimony of Mr. Giger, Record p. 1243.) The bank was still carrying as an asset in its statement of resources at the close of business, February 28th, 1920, the banking house at $280,000, which is the net amount, deducting $70,000, the Penn-Mutual mortgage, from $350,000, the original price for Lots 11 and 12 formerly belonging to the bank.

Mr. Shelton testifies as follows with reference to (Record p. 1160) a note dated October 7th, 1920, in the amount of $363,825, being $350,000 and interest. This was executed by the Scandinavian American Building Company and left with the bank. This was looked upon as a tentative matter to be substituted by the second mortgage bonds in time (Record p. 1162). December 10, 1920, the question of collateralizing the $600,000 mortgage was taken up and passed upon, but there is nothing in the books in reference to that matter and there is no meeting by the building company authorizing this (Record p. 1163). The stock in the building company was, on June 5th, 1920, charged to the stock and bond account (Record p. 1165) of the bank and was done at the direction of Mr. Larson. *I knew we were drawing against the $200,000 which was credited on account of the stock transaction (Record p. 1167). I knew there were overdrafts and Mr. Larson attended to this and when he was not there the overdrafts probably stood*

until he returned. This note of $363,825 was executed to protect the bank as far as we could. It was kept among the papers on my desk. The note was dated October 7th, 1920. The bank deeded the property to the building company under the agreement that the second mortgage bonds would be delivered to the amount of $350,000. To this note was attached a memorandum reading as follows:

> "Amount of bonds to be delivered pursuant to resolution and agreement, February 10th, 1920, $350,000, interest 6% from January 10th, 1920, to October 10th, 1920, $13,825."

Fraud in Obtaining Contracts and Waiver of Lien.

R. T. Davis was manager of the Millwork Company. Attached to the general millwork contract or material contract is the proposal submitted February 17th by our company, both proposal and contract being under Exhibit 151. The proposal was approved or accepted by Mr. Webber, the architect for the building company. Exhibit 151 appears at page 746, Exhibit 152 at page 758, and Exhibit 153 at page 763 of the Record.

Exhibit 152 is the work contract or the contract for the erection of the millwork material and is separate and distinct from the other. The first contract, being the material contract, totalling $65,000, containing separate and distinct terms from Exhibit 152 being for $30,000 and called the

erection contract. Exhibit 153 is a contract for the banking quarters, which is both for material and its erection, amounting to $1,957. (See page 668, Record.)

These contracts can therefore be styled:

The material contract, Exhibit 151, the work contract, Exhibit 152, and the banking quarters contract, Exhibit 153.

Mr. Davis says that the first man he met about February 17th, 1920, in the matter of the proposal was Frederick Webber, who introduced him to G. Wallace Simpson. That same afternoon he met Drury, Bean and Larson at the Tacoma Hotel.

Mr. Davis says, after discovering the waiver of lien clause I instructed my brother after signing the contracts at the factory not to turn the contracts over to the building company unless they accepted the rider reviving the lien in case payments were not made. My brother, George Davis, then 'phoned me from their office and in their presence that all contracts must be exactly alike; that there were no riders in anybody's contracts. That Drury stated that they had $400,000 cash on hand and a mortgage commitment for $600,000 which would be completion money and that there was no need of worry, and that if we were skeptical we could have the money in advance (Record p. 695). That Davis came down the next morning and got $15,000 advance, giving his note, however, the excuse being given by Larson that the contracts had not been entirely signed up and that they

would take the note out of the last estimate due on the building (Record p. 696). Mr. Drury stated that the McClintic people and the terra cotta people had signed identical contracts waiving the liens. I thereupon told my brother that if they had given him these assurances that we would have to submit to like terms. The following day I received similar assurances from Mr. Drury in person.

The McClintic people, however, had distinctly reserved their lien and the Washington Brick, Lime and Sewer Pipe Company had also distinctly reserved it. (See respectively Exhibit F and Exhibit 136.) Mr. Webber had already accepted our proposal and we had waived no lien rights therein. The following day, at his request, I began to perform work on this contract and it was about a week before I saw this formal contract (Record p. 698). I understood that the Metropolitan Life Insurance Company was requiring waiver of lien clause. It is true that I went ahead and did all this work knowing that the riders were not attached (Record p. 699). I relied upon the statement that there was $400,000 cash on hand and that the $600,000 mortgage was definitely financed (Record p. 700). I would not have signed these contracts but for the fact that I had had certain business relations with Mr. Drury for several years and relied on his statement. They said they had a commitment from the Metropolitan Life Insurance Company (Record p. 700). Mr. Drury had told my brother that the steel and terra cotta

people had signed a similar contract waiving their liens. Under agreement that they could advance this money they did give us $15,000 on account (Record p. 701). I found out after the failure of the bank that the building company did not have $400,000 or any appreciable part of it and found out a long time after filing our first lien that it did not have a commitment under the $600,000 mortgage (Record p. 703).

George Davis, assistant manager of the Tacoma Millwork Supply Company, testified as follows: I gave Mr. Webber the figures on the proposal verbally. Mr. Drury introduced him to me as "our architect" and that any arrangement made with the Millwork Company would be satisfactory to himself (Drury). At the mill Mr. Webber gave us the contract and our proposals, now in evidence, were accepted by Mr. Webber and we immediately began work. We prepared detail drawings, bought green lumber and put it in the dry kiln and immediately contracted for mahogany lumber, paying $5,000 the following day to be sure and hold it. This was before we knew there was to be a formal contract. About February 25th we, for the first time, saw such a contract with a waiver of lien clause and then drew a rider to offset it, signed the contract at our office and I took them to Mr. Webber with the rider attached. Mr. Drury objected strenuously and said, "We have $400,000 on hand and $600,000 for completion money," and also said, "This is an eastern form of contract

and it won't hold in this state anyway and if the contract is broken you automatically get your lien." Simpson, Larson and Miss Carlson, Mr. Larson's secretary, and Mr. Webber were present. Mr. Drury said if we were in doubt we could have money in advance, but that the contracts would all have to be alike. That the eastern finance people demanded contracts with a waiver of lien clause. Mr. Drury and Mr. Simpson said the contracts must be uniform, Simpson also saying that his people demanded this. Simpson was introduced as the agent for the Metropolitan Life Insurance Company. Mr. Drury said that the other people were accepting these contracts as made; that the steel and terra cotta people had accepted them.

I then called my brother in their presence stating the substance of this talk and that Mr. Drury had assured me that the other people had all waived a right to a lien. I then repeated my brother's conversation (already given) to these gentlemen in the room. It was then agreed that under the assurances given the riders might be detached (Record pp. 705-707).

The proposals were written February 17th, 1920, and were accepted by Mr. Webber February 18th, 1920, and we commenced work February 19th, 1920 (Record p. 711). The formal contract was submitted to us about February 25th, 1920 (Record p. 714).

Miss Carlson verified the testimony of Mr. George Davis (Record p. 1115). That Mr. Drury repre-

sented that there was $400,000 on hand. That the $600,000 mortgage had been secured or was about to go through (Record p. 1116). That the Life Insurance Company demanded waiver of lien and I got the understanding from conversation between Mr. Drury and contractors that all of the contracts would have to remain alike (Record p. 1116). Miss Carlson, it is true, says at one place that she does not believe that there was any representation that the loan had actually been made. The same representations were made to all the contractors (Record p. 1117).

Elmer E. Davis testified that: Simpson, Drury and Larson stated to me that there was $400,000 cash on hand and $600,000 ready that they had borrowed on a mortgage. This conversation occurred about February 28th, 1920, when I first noticed this lien waiver clause and they then said it was a requirement of the Insurance Company who had loaned them money on the $600,000 mortgage and that all contracts would be signed alike, and that his contract was practically the last one to be signed and that the other contracts had already been signed with this waiver of lien. It was under these assurances that he signed his contract.

George Davis says (Record p. 729), that Mr. Drury, in talking with him, said that the $600,000 represented a first mortgage on the property. That the building company was full owner of the property with nothing against it except this mortgage.

Fulfillment of the Contract by the Millwork Company.

This heading subdivides itself into two divisions —a. *Actual work done upon the various contracts* —b. *Deliveries of such work.*

a. There can be but little question as to the amount of work done upon the contract. There is no countervailing testimony, but some attempt on cross-examination to show that there had not been the amount of work done claimed by the Millwork Company.

R. T. Davis states that the material contract was ninety per cent completed toward the end of December, 1920. Exhibit 154 (found at page 766, Record) shows a computation of various claims, but also shows the state of completion of the material; the legend designating C. W. to mean "complete at warehouse" and C. F. "complete at factory warehouse." Some of the material is marked partially completed, but for this no charge is made (Record p. 670).

About ninety per cent of all the material under these contracts was gotten out, fashioned and tendered to the building company and under the labor contract we performed about twenty per cent of the labor (Record p. 669). The $65,000 contract, or the material contract, covered merely the furnishing of the bare material. We were not to put it in place but were merely to deliver it to the building at the best. The proposal for the material was accepted February 17th and on the

following day Mr. Webber accepted the proposal to do additional labor work, but the proposals for both of said contracts were being considered the same day, one in the forenoon and one in the afternoon (Record p. 689).

George T. Davis says that they had the material contract, or the $65,000 contract, about ninety per cent completed when the company failed and that their charges on Exhibit 154 are only for fabricated material, either completed or in advanced form ready to set up in the building by mere dove-tailing or something of that kind, or in the case of styles that are unusable elsewhere (Record p. 704, see also pp. 712-13).

C. D. Lindstrom, witness for the Millwork Company, said (Record p. 715) that the prices for the materials submitted on the Millwork Company's list are very fair. That they are reasonable prices as of that time and the work is good quality. That it is very near what he would consider a cabinet job of work (Record p. 717). I would say that about one-half of the door stock was finished and veneered and the other one-half was glued up ready for veneering. Fully one-half of it was veneered (Record pp. 718-19). There were 537 door stiles veneered and 356 stiles with cores made up but not veneered and in the pile I found the veneers cut for the bottom and top rails. The panels are all complete and ready for the doors and the material for the doors is all there (Record p. 719). I would say that sixty per cent of the

labor is still to be done on the doors themselves. One could not make these doors under $34 or $36 in quantities and a charge of $20 for the doors in their present state of completion as made by the Millwork Company is very fair. It is practically actual cost. The total cost of such doors with panels would be $33.20 (Record p. 722, see also p. 726).

On the question of fulfillment of contract and its reasonable value there was considered by the court the question of salvage.

R. L. Reedy, called as a witness for the Millwork Company says (Record p. 703), that he was sales manager for the Wheeler Osgood Company. That the prices submitted by the Millwork Company were fair. It is special work and when once cut and manufactured for a particular job it is improbable that it could be used for any other purpose to any profit.

E. C. Cornell, also a witness for the Millwork Company testified as follows: That he has been a general contractor for 32 years. That there might possibly be $1,000 of salvage if this material be sold. The design is a special design and is different from those by western architects. You would have to persuade someone to use this material. Labor is thirty per cent more efficient than two years ago and we are paying $1.00 less.

J. E. Bonnell says in this matter that the panels of the doors are good and the base board could be used. The rest of the material is pretty hard

to put a price on for salvage. I would not give anything for it. If a man had a place to store this material he might roughly estimate three or four thousand dollars for it and then you would have to consider insurance and storage. The job is very peculiar, being an old style and something that has not been done for years.

R. T. Davis states that they have been paying $100 a month for storage of about one-half of this material and, in fact, paid $150 a month for one floor for a short time and that now they are getting it for $75 per month. Insurance runs about $160 a year (Record pp. 728-29).

R. T. Davis testified in similar manner to Mr. Cornell and Mr. Bonnell, in effect, that this is a peculiar style job and the material could not be used on another job because architects usually design their buildings according to their own ideas.

b. *Deliveries*:

The material contract (Record pp. 746-58, inclusive, Exhibit 151) provides in the proposal that the painter for the building company would do the primeing in the factory before deliveries and contains this provision:

> "Owing to the great quantity of this work and our limited storage facilities, it will be necessary that we ask you to provide dry storage space, and accept delivery as fast as manufactured."

The proposal is made part of the contract (Record, see p. 746). The contract was in printed

form and contained provisions applicable to material men and contractors or subcontractors as well. In paragraph V there is a provision to deliver and put in place. This, of course, is negatived by the clause in the proposal to provide dry storage space and by the general tenor of the millwork contract which is merely for material since there is a distinct work or erection contract found on pages 759, *et sequor*, Record.

Exhibit 167 (Record p. 774) is a letter by the Millwork Company to the Scandinavian American Building Company, asking that they be relieved of the storage of these frames; that deliveries of the frames to the building had been greatly delayed through no fault of theirs, to which the building company, through its superintendent, replies that he cannot see "his way clear to receive any frames at the job right away, that he hopes to have room for part of the frames by the 15th of January, and if sooner will advise" (Record p. 175).

Exhibit 168 (Record p. 776) tenders the materials ready to the receiver, Mr. Haskell. Mr. Haskell refused to accept them (also Exhibit 168, Record p. 777) apparently on the grounds—one, that the material had never come under his jurisdiction as receiver of the building company, and—two, that the Millwork Company was to deliver the material to the building site as soon as it was required in the construction of the building.

R. T. Davis, Jr., says in confirmation of these proposals as to storage and deliveries, that Mr.

Webber, the architect, visited the warehouse at Pacific Avenue and also at the factory August 10th, accompanied by Mr. Wells. Later Mr. Drury saw the work and stated that he was well pleased. Mr. Lindberg, one of the directors of the building company, also came out.

Repeatedly prior to the writing of a letter of December 30th we asked them to relieve us of the congestion (Record p. 677) I had a talk with the officers of the building company. We did not deliver on the building for the reason that there was no room for the material there, and they would not permit us to put them on the building because it would slow down the work and there was no roof and the work would be ruined, and it was for their protection and at their suggestion that the work was kept in storage.

We stated to Mr. Haskell that all of the materials were his as receiver, but never received an order from him to place them on the building (Record p. 679). At Mr. Webber's request we rented storage space and paid the rent and had the material covered by fire insurance (Record p. 689). I wrote the letter (Exhibit 175) of August 3rd, 1920, to Mr. Webber, in substance as follows:

> "In reply to your phone conversation in regard to the storage, insurance and delivery of the millwork in storage for the Scandinavian American Bank Building, we wish to state as follows:
>
> "We have and will keep the material in stor-

age fully insured against fire loss, and in the event of fire loss we hereby agree to reimburse you to the full extent of your interest therein.

"Also we agree to deliver all of this material to the building site upon your order.

"We wish to state too, that we will bear the expense of this accommodation ourselves as it is our desire and Mr. Webber's wish that we expedite the manufacture of this material and he acquiesced in this plan of procedure."

About January 6th or 8th I talked again with Mr. Wells to the effect that the material was accumulating and that delivery ought to be made and he again refused to take it on the building, saying that it was impossible owing to the state of the building (Record p. 697). I was after him all the time to take it out of the factory and he replied that he could not take any of it because he had no place to put it.

George Davis testifies that he talked with Mr. Wells several times and begged relief for the overflow of material at the factory. Wells replied that all he could do was keep it. "I cannot put it on the building owing to its condition" (Record p. 707). That the agreement was that they would take it as fast as manufactured. That he, himself, took Webber and Wells through the warehouse down town and the warehouse at the factory and spoke to them about the accumulating charges for rent, etc., and insurance and I was assured that that would be taken care of on final accounting.

The material would have been spoiled if it had been left where water and rain could get to it, which would have resulted had it been delivered on the building and would have resulted in a heavy loss to the building company. It is never customary to deliver this character of material on the premises until there is a roof on the building.

When I handed the key to the warehouse to Mr. Haskell payment had been made on some of the work at the warehouse and some of the work at the factory. We were at all times ready to deliver this material to the receiver and at all times ready to deliver to Mr. Webber and the building company (Record pp. 708-09). When Mr. Webber urged us in the beginning to hurry the material out I said to him, "What are you going to do with it?" *He told us to find some storage space at the factory and to let the overflow go into the warehouse; that they would accept it that way and make payments as manufactured and on notice would have their painters start work on it* and such notice was, from time to time, given (Record p. 710).

Mr. Wells went through the warehouse and the factory and accepted both the material at the factory and the material at the warehouse (Record p. 707). Mr. Drury was there and Mr. Lindberg. We pointed out the congestion at the factory and Drury made the excuse that the building was not far enough along and that he did not see how they could take it (Record p. 711). We had nothing to do with the painting or priming (Record p. 713).

With reference to the open contract on bucks (Exhibit "B" attached to the pleadings) in the sum of $1,266; the bank fixtures contract, Exhibit "C" and the labor contract to the extent of $6,043 certain pieces of wedging, Exhibit "F," in the amount of $8.00 was done. There is no dispute that these items were done. The reasonable value is exhibited.

The following schedule (Record p. 773) gives the method of reaching the totals sued for by the Millwork Company:

Exhibit A, Materials	$58,555.92	
Exhibit B, Door bucks	1,266.00	
Exhibit C, Bank quarters	1,957.00	
Exhibit D, Labor contract	6,043.00	
Exhibit E, Scaffold bucks	200.00	
Exhibit F, Wedges	8.00	
Exhibit G, Bond	718.41	
	$68,748.33	$68,748.33
Credits May 14, 1920, Payments	$ 8.00	
August 16, 1920, Payments	5,100.00	
Sept. 18, 1920, Payments	1,132.50	
Total credits	$ 6,240.50	$ 6,240.50
Balance due		$62,507.83

Profit entitled to on balance of Labor Contract	6,000.00
Profit entitled to on balance of Main Contract	1,000.00
	$69,507.83

A lien was therefore filed for $69,507.83. This compilation is explained by Mr. Davis. (See pages 674, 688, 693 and 701, Record.) In substance this work on the work contract was the fashioning of the material in the factory, mitering it and glueing it, so that this particular part of the work was saved on the erection job and was work that was always left to the independent laborer or contractor who would receive the material from another and erect it.

ASSIGNMENTS OF ERROR.

I.

That the District Court erred in refusing to grant judgment and decree to appellants in the nature of a statutory lien for all materials prepared, as supported by the schedules attached to appellants' complaint, whether stored in warehouse distant from or at the factory, without distinction as to whether it was delivered upon the building, for the reason that under the statutes of the State of Washington, in such cases made and provided, the appellants are entitled to a statutory material lien.

II.

That the District Court erred in refusing to grant a labor lien for work done on material specially designed for this building, for the reason that under the statutes of the State of Washington, in such cases made and provided, appellants are entitled to a labor lien for such work, or are in any event under such statutes entitled to be placed in the position of a subcontractor for the erection of interior finishing upon the building in issue.

III.

That the court erred in not granting to said appellants an attorney's fee commensurate with the work involved and the amount recovered, for the reason that appellants were entitled to a statutory lien for labor and material delivered or furnished for use in construction of said building, and were entitled to have added to their judgment a reasonable attorney's fee under the said statutes.

IV.

That the said District Court erred in giving and granting to certain of the lien claimants a status prior to and superior to that of the appellants herein, in that the lower court granted to those delivering material upon the premises a lien for all of such material, and gave to appellants a lien only for materials delivered upon the premises and refused a lien to appellants for material specially constructed by way of interior finishing for the property in issue but not delivered upon said premises; and particularly erred in refusing to grant such lien since delivery was made at warehouse under special direction of or by consent of defendant Scandinavian American Building Company, hereinafter referred to as the owner.

V.

That said District Court erred in giving to certain labor claimants or subcontractors a status prior and superior to the status of these appellants in the particular of refusing to allow these appellants a lien for labor done upon certain material to make it more ready for erection, being particularly labor on erection, in the amount of $6,043, and in this manner granted a laborers' lien to such laborers or to subcontractors doing laborer's work upon said building who actually performed the labor upon the premises as distinguished from the performance of such labor away from the premises but upon material to be used for the construction of the building in issue, since the statutes of the

State of Washington in such cases made and provided grant a lien for such labor as performed by said appellants and grant no priority in the premises to parties so situated.

VI.

That the said District Court erred in granting to the said appellants a personal judgment for $57,005.67, inclusive of interest as appears in paragraph XXV of said decree, for materials prepared for use in construction of the building in issue, and in not granting a statutory lien for such materials upon said property for the reason that in such cases the statutes of the State of Washington provide a material man's lien; and further erred in granting a personal judgment in the amount of $6,043, plus interest, for certain labor performed away from the premises preparatory to erecting such material under an erection contract, and which labor did or would have facilitated the erection when placed upon the building, instead of granting a lien, for the reasons that the statutes of the State of Washington, in such cases provide a laborer's lien, or in any event a subcontractor's lien, and erred in giving a judgment in damages instead of judgment and lien as prayed for.

VII.

That the said District Court erred in granting to the Scandinavian American Bank rights, by reason of alleged advances under what is known as the $600,000 mortgage, prior and superior to the rights of these appellants, excepting insofar

as liens are granted to these appellants for a minor portion of their material, for the reason that the advances, so-called under the $600,000 mortgage, as claimed by said bank, were made with the full knowledge that these lien claimants were told by the very officers of said bank, who had full control of both said bank and said building company, and were likewise the officers of the building company, that the building company had on hand $400,000 in cash, and that the full amount of the $600,000 mortgage would be used in the final completion of said building, whereas said officers all knew that said building company did not have a dollar on hand; and for the further reason that said building company was merely a creature of the bank or an entity constructed by the bank for its own purposes; and that said band is estopped to claim any preference by reason of the representations made either as to advances under said $600,000 mortgage as claimed, or because of the payment of the $70,000 mortgage; and for the further reason that the said bank warranted said land as free and clear of encumbrances.

VIII.

That the said District Court erred in holding, as more fully appears from the memorandum decision filed in this cause, and dated the —— day of April, 1922, that under the statutes of the State of Washington, relating to material and laborer's liens, the material must be furnished and delivered upon the premises, and the work must be done there,

when in truth and in fact the said statutes do not provide for delivery at all but speak of the furnishing of material for use in the construction of a building.

IX.

That the said District Court erred for the reason that said decision operates to take property without due process of law.

X.

That the said District Court erred for the reasons specifically set forth in the exceptions to the findings in said memorandum decision herein just referred to, and to the further exceptions filed to the judgment and decree against which these assignments of error are laid.

XI.

That said court further erred in said judgment and decree in any and all findings or holdings which grant to any material man, or to any claim other than the preferred class of laborer's rights superior and prior to these appellants as material men, and which grant any rights superior or prior to the rights of these appellants in their labor claim as recited in the schedules attached to said appellants' complaint.

XII.

That said court further erred in not entering an order declaring that all of the material recited in the schedules attached to plaintiff's complaint was and is an integral part of the premises or property herein sought to be liened, for the reason

that said appellant tendered all of said material within the time limited by their contract, that it was specially designed and worthless upon their hands, and that it was stored with the consent of the owner and retained in the storehouse away from the property only because of the owner's convenience, and the safety of the material.

ARGUMENT.

Is Delivery Upon the Ground Itself Under the Statutes of the State of Washington in the Circumstances Detailed in the Evidence Necessary to the Establishment of a Lien?

The principal criticism of the trial court's decree relates itself to a refusal to grant a statutory lien for all materials prepared by this appellant without distinction as to whether they were delivered to the building or stored in the warehouse at the factory or in a warehouse distant from the factory; and its refusal to grant a lien for the labor done on material specially designed for this building which would come properly under the labor contract. This criticism is found in assignments of errors numbers I, II, IV, V, VI, VIII; in the references found in assignment of error number X and in assignment XII.

Under the heading "Fulfillment of Contract by the Millwork Company," found in the statement of facts in this brief, we have detailed, by reference to record pages, the deliveries of the material under the material contract. (See page 29, *et sequor*, of this brief.)

The proposal was attached to and made a part of the contract (Record p. 746). The contract was in printed form and contained many provisions foreign to a material man. The proposal suggested:

> "Owing to the great quantity of this work and our limited storage facilities, it will be

necessary that we ask you to provide dry storage space, and accept deliver as fast as manufactured."

The letter of August 3rd, 1920, Exhibit 175, says: "In reply to your (Webber's) phone conversation in regard to storage, insurance and deliveries of the millwork in storage for the Scandinavian American Building Company * * * we have and will keep the material in storage, fully insured against fire loss * * * agree to deliver all of this material to the building site upon your order." Under Exhibit 167 (Record p. 774), in a letter to the Building Company the Millwork Company again asked that they be relieved of this storage; that deliveries had been greatly delayed through no fault of theirs; the Building Company replying that they could not receive this material then, but hoped to have room for part of it by January 15th. Under Exhibit 168 (Record p. 776) all materials were again therein and verbally tendered to Mr. Haskell the receiver and they were refused on the grounds given at page 33 of this brief.

That R. T. Davis, the manager of the Millwork Company repeatedly prior to December 30th, asked the Building Company to relieve this congestion in storage and the Millwork Company did not deliver at the building because there was no room there and they would not permit it because it would slow down their work; there was no roof and the work would be ruined. It was for the Building

Company's protection and at their suggestion that the materials were kept in storage.

About January 6th, the manager again offered to deliver all materials and the superintendent of the Building Company again refused, owing to the state of the building; that he had no place to put it.

George Davis, assistant manager, testified likewise (page 36 of this brief) that Webber and Wells were taken through both warehouses and they assured George Davis that the accumulating charges for rent and insurance would be taken care of; that rain would have spoiled this work at the biulding and that it is never customary to deliver this kind of material on premises until there is a roof for protection. (See page 36 of this brief.) That they were at all times ready to deliver to the receiver or to Mr. Webber and the Building Company; that they urged hurry on this work and that Mr. Webber told them to find storage space and let the overflow go into the warehouse. *That they would accept it that way.*

That Mr. Wells, as superintendent, went through both warehouses and accepted the material at the factory and at the warehouse. That Mr. Drury made the excuse that the building was not far enough along and they could not take the material on it (pages 35-36 of this brief.)

In the brief submitted to His Honor Judge Cushman, known as the memorandum brief of the Tacoma Millwork Supply Company analyzing a portion of the memorandum decision at page two, we

suggest, before entry of the decree, "That offer was made in open court that Your Honor could clothe the building by a simple equity order granting over this material to the receiver."

Deliveries must be construed to take place in this character of work when once cut to design for it is useless elsewhere, and, impliedly, therefore, the owner accepts it when so specially fashioned regardless of delivery anywhere, unless the fabricator shall have expressly refused delivery.

R. L. Reedy, sales manager of the Wheeler Osgood Company (Record p. 703), a large sash and door factory, says that this is special work and when once cut and manufactured for a particular job it is improbable that it could be used elsewhere at profit.

E. C. Cornell, a contractor for many years, says that the design is a special design and is different from those by western architects.

J. E. Bonnell, another contractor of long standing, says that the job is very peculiar, being an old style and something that has not been done for years. These men all say that the salvage would be practically nothing.

R. T. Davis gives similar evidence as to the peculiarity of style and design and that it would be useless elsewhere.

Mr. Lindstrom (Record p. 715) speaks of this as a cabinet job or work of good quality.

The court in its memorandum decision on the question of this constructive delivery (Record p.

439) in denying a lien right to this appellant, says:

> "The court holds that there is no lien right on the part of any claimant here for any material or fixture not delivered on the premises where the building was in course of construction, nor for any labor performed on any such material or fixture.
>
> While it may be true that, in a controversy solely between the material man, or contractor or subcontractor, and the owner, the owner will be estopped to deny the lien because of a failure to deliver the material, where any act of his, or act with which he may be charged, has in any way caused such failure, yet when the substantial controversy is, as it is here, between the lien claimants, no such rule should be applied.
>
> Cases where fixtures or other material not delivered have been specially prepared and their value, apart from the structure for which they have been prepared, is little or nothing, make a strong appeal for consideration in equity, yet to allow the lien on that account would lead to unending uncertainty, doubt and confusion and to prejudice of others contemplating furnishing material or who have furnished labor and material.
>
> Material delivered upon the premises constitutes notice, not only to the owner, but to other material men, laborers and contractors of potential charges against the property, but

materials not delivered, in the absence of actual knowledge, cannot do so.

A particular lien claimant has a right, not only to look to the property improved, but to the value of the improvement as it progresses and to the materials assembled upon, and delivered at the property for its improvement.

Claims of lien for material not actually delivered at the bank building are denied. The following Washington cases—the construction of which court, of the statute involved, this court is bound to follow—require such holding:

Knudson-Jacob Co. v. Brandt, 44 Wash. 68.

Crane Co. v. Fernandis, 46 Wash. 436.

Tsutakawa v. Kumamoto, 53 Wash. 231.

Gate City Lbr. Co. v. Montesano, 60 Wash. 586.

Western Hdwe. & Metal Co. v. Maryland Cas. Co., 105 Wash. 54.

Holly-Mason Hdwe. Co. v. National Surety Co., et al., 107 Wash. 74."

With these authorities before you this court can readily reach a conclusion on this matter. The authorities cited are practically all the authorities in the State of Washington upon this subject.

We will take them in the order of their recital by Judge Cushman.

Knudson-Jacob Co. v. Brandt, 44 Wash. 68:

Here a number of houses were being constructed and it could not be determined what particular part of the material was furnished for any par-

ticular house. The court said of the case of *Western Hdwe. & Metal Co. v. Maryland Cas. Co.*, 105 Wash. 54, at page 67, "This was the real reason that the lien claim could not be sustained."

We suggest that the latter case was decided May 31st, 1919, and is the last expression of the Supreme Court of the State of Washington upon this subject.

The *Holly-Mason* case hereafter referred to appears in 107 Wash. 74, but was decided May 14th, 1919, by the same bench, while the rehearing in the *Western Hdwe.* case was by the full bench under the date given, namely, May 31st, 1919.

Gate City Lbr. Co. v. Montesano, 60 Wash. 586:

Speaking of this case we find that here there was a claim for lumber. The evidence showed the placing of this lumber at a railroad station some distance from the place where the work was carried on. The court said in summarizing this case in the *Western Hdwe.* case, already cited:

> "In that case there was no understanding and no necessity for the lumber being delivered at a shop or place where the contractor or subcontractor was specially preparing his material before being placed in the structure, as in this case."

It also spoke of the case of *Little Bros. Mill Co. v. Baker*, 57 Wash. 311, saying that the lien failed in that case because of inability to trace the material. The Supreme Court then continued:

> "We think none of these cases are control-

ling here."

Crane Co. v. Fernandis, 46 Wash. 436:

The court, in this case, said:

> "We are unable to find competent testimony tending to show that the material was for use in the building, or was so used. The person who it is claimed delivered the material was not in court."

Tsutakawa v. Kumamoto, 53 Wash. 231:

This was a railroad construction lien, and peculiarly was for provisions, groceries and camp equipment supplied to the construction company. The court simply holds that the word "supplies" cannot be construed to fall within material furnished.

Holly-Mason Hdwe. Co. v. National Surety Co., et al., 107 Wash. 74:

In this case hardware was sold by the Holly-Mason Co. to the contractor. Respondent had a place of business in Spokane, some distance from the building being constructed. As orders were received respondent delivered to a common carrier, sometimes to a railroad company and sometimes to an express company, for transportation to a station two and one-half miles from the building. Here the goods were receipted for by the contractor or someone in his behalf. Actually the goods were received by draymen or other employees, and "the respondent was unable to show that more than a small quantity of them actually reached the building." The respondent sued the Surety Company on its bond, executed in behalf of the contractor.

We have left consideration of the *Western Hardware* case to the last and will quote liberally from it, for in this case the question in which we are principally interested is considered.

This is also a bond suit. The court first points out the similarity between these statutes, namely, the lien statute and the bonding statute. The court then sets out the Mechanic's Lien Statute in its essentials:

> "Every person * * * furnishing material to be used in the construction * * * of any * * * building * * * has a lien upon the same for the * * * material furnished by each respectively, * * * and every contractor, subcontractor, architect, builder or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter." Rem. Code, Sec. 1129.

Now follows the essence of the bonding statute:

> "* * * pay all laborers, mechanics and subcontractors and material men, and all persons who shall supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work, * * *" Rem. Code, Sec. 1159.

The court then says:

> "It would seem, therefore, that, since our lien statute secures by lien payment for 'fur-

nishing material *to be used in the construction,'* etc., and our bonding statute provides for the securing by bond the payment of 'subcontractors and material men and all persons who shall supply such person or persons, or subcontractors, with provisions and supplies for *the carrying on of such work,'* there is an analogy between these statutes, insofar as we are here concerned with the question of the necessity of the material furnished by respondent going into the structure of the plant in order to give the respondent the right of recovery upon the bond."

Later the court quotes from *Huttig Bros. Manufacturing Co. v. Denny Hotel Co.,* 6 Wash. 122. Here the material did not actually go into and become a part of the structure.

"It is conceded that said materials were all furnished under a contract between said respondent and said contractor, and that the same were specially designed and made for said building, and are necessary to the completion of the building; that they have been delivered and are now upon the premises of the building. It further appears that the only reason why the same has not been used is in consequence of the contractor having suspended work. Under such circumstances we think the right to a lien for all of said materials exists."

The court continues in the *Western Hdwe.* case:

"The decisions of the courts of other jurisdictions are seemingly out of harmony upon the question of the necessity of material being actually used and becoming a part of the structure in order to sustain a lien for the value thereof in favor of one furnishing such material. This conflict, however, we think, may, in many instances, be regarded as more apparent than real, and as growing out of the language in the different statutes giving the right of lien. Of course, where a statute by its terms gives a lien right only for material actually going into and becoming a part of thestructure, as some of them do, such a condition is necessary to support a claim of lien thereunder; but such are not the terms of our lien or bond statute.

In the early case of *Hinchman v. Graham*, 2 Serg. & R. (Pa.) 170, a view of the law was expressed with which our *Denny Hotel* case, above quoted from, is in full harmony. In that case the material seems to have been furnished by a material man to the owner of the building to be used in the construction thereof, such failure not being the fault of the material man. In holding that it was not necessary that the material go into and become a part of the structure as a prerequisite of the material man's rights, Chief Justice Tilghman said:

' * * * The act of assembly makes the

house subject to all debts 'contracted for or by reason of any materials found and provided by any lumber-merchant, etc., *for* or *in the erecting and constructing of such house;*' that is to say, furnished *for* the erection of the house or used *in* the erection of the house. The expression seems intended to meet the very case which has occurred. The merchant having sold and delivered the materials for the purpose of being used in the building, could do no more; it would be unjust, therefore, to throw upon him the risk of their future application. But it is said that there is a distinction between materials delivered *at or near* the building or at a *distance* from it; but I cannot see it, provided that the delivery *at a distance* was in the *usual course of business*, as it was in this case. It is customary to prepare part of the carpenter's work at the shop; why then should the boards be thrown down first at the building, in order to be taken up again and carried to the shop? The delivery at one place or another, is no further important, than that it furnishes evidence of the purpose for which the materials were sold. The act of assembly makes no mention of the place of delivery * * * I am of the opinion, that the account of C. J. Remington should be allowed as a lien,

> although the lumber was not delivered *at or near* the house, or *used in the building of the house.*'

In this case is also cited *Beckel v. Petticrew,* 6 Ohio State 247, and in this latter case is cited *Foster v. Doble,* (Nebraska) 24 N. W. 208, referred to in the *Holly-Mason* case, 107 Wash. 78.

We think, and express it with certainty, that the use of the foregoing cases by the Supreme Court of the State of Washington in the *Western Hardware* case fixes the law of this State—That deliveries of specially designed material is not required to give rise to a lien so long as there is willingness to deliver and good faith on the part of the contractor.

The court continues in the *Western Hardware* case:

> "In *Berger v. Turnblad,* 98 Minn. 163, 107 N. W. 543, 116 Am. St. 353, there was involved a claim of lien for work upon material furnished for the building, done at the instance of the contractor at a shop away from the building, which material, and hence, such work did not go into the structure. In holding that the claimant had a right of lien under such circumstances, Chief Justice Start, speaking for the court, said:
>
> > 'It is true as a general rule that to entitle a mechanic or materialman to a lien for work performed or materials furnished at the request of the contractor, the work

must be done, or the material delivered on the premises upon which the building is being erected. The case of *Howes v. Reliance Wire Works Co., supra* (46 Minn. 44, 48 N. W. 448), however, establishes an exception to this rule which is to the effect that where the material required for the erection of a building is specially prepared for it at the shop of the contractor with the consent of the owner, the material is deemed to have been furnished on the premises.'

The findings of the trial court in this case brings it clearly within the exception, for the work of the plaintiff was by the consent of the defendant, performed at the shop and it was there passed upon by the defendant and by his architect as the work progressed. The defendant and the contractor adopted the shop as the place for doing the work which was necessary to be done in the erection of his house. The plaintiff's right to a lien then is exactly what it would have been if he had performed the labor in the preparation of the materials for the erection of the house on the premises on which it was being built and the contractor had refused to permit the product of his work to be placed in the house.' "

The court cites the following additional cases: *Trammell v. Mount*, 68 Tex. 210, 4 S. W.

377, 2 Am. St. 479;

Watts v. Whittington, 48 Md. 353;

Nelson, Benton & O'Donnell v. Iowa East R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124;

Burns v. Sewell, 48 Minn. 425, 51 N. W. 224;

Crane & Co. v. United States Fidelity & Guaranty Co., 74 Wash. 91, 132 Pac. 872;

Phillip's Mechanic's Liens (3d Ed.), p. 260;

2 Jones Liens (3d Ed.), Sec. 1329.

The Supreme Court of the State of Washington then definitely and distinctly establishes the law of this case now before this court in the following language:

"It is further contended in appellant's behalf that respondent's claim against appellant, as surety on the bond, must fail because the material so furnished by it was not delivered at or near the school building in which the plant was being installed. The decision of the Pennsylvania court in *Hinchman v. Graham*, above quoted from, is authority against this contention, as is also the decision of the Minnesota court in *Berger v. Turnblad*, above quoted from This view of the law also finds support in *Trammell v. Mount, supra*, and *Evans Mable Co. v. International Trust Co.*, 101 Md. 210, 60 Atl. 667, 109 Am. St. 568.

The following of our decisions, it is insisted, hold to the contrary, but we think they do

not do so when critically read: (The court then cites:)

Knudson-Jacob Co. v. Brandt (*Supra*);
Little Bros. Mill v. Baker (*Supra*);
Gate City Lumber Co. v. Montesano (*Supra*).

The right of lien is not defeated where delivery is prevented by the act or direction of the owner as to delivery at another place, or when the material is ready for delivery the owner violates his contract and refuses to receive it. This is true of work necessarily done in a mechanics shop, 18 R. C. L. Mechanics Liens, Sec. 51, citing many of the cases presented in the Western Hardware case.

The earlier Minnesota cases are approved in doctrine in the case of *Thompson-McDonald Lumber Co. v. Morowitz*, 149 N. W. 300, and *Minneapolis Sash & Door Co. v. Hedden*, 154 N. W. 511.

Judge Cushman's decision leads to the idea that no large office building can be undertaken in its specially constructed work with safety because the great cost of that character of work is the specialized labor, and at any moment this entire work, on failure of the owner, may fall to the ground. The statute never contemplated such a risk. It invites the material man to proceed in fashioning his material and when it is necessary to fashion it away from the plant, and it is common usage to do so, we can conceive no logic in the idea that the other lien claimants might omit something or might be prejudiced in something on the theory that they

did not know of potential delivery of this character of material. One might as well speak of orders given for specially constructed vaults, costing thousands of dollars, absolutely necessary for a bank as is known under modern condition, and which could not in the character of the work have begun constructing until after the contract was let for the building. Suppose that the vaults were on their way, the owner to take delivery at Tacoma, and the owner goes bankrupt. What right has the receiver to refuse these vaults which necessarily belong to the building? The statute is designed to protect. It has been repeatedly held that it demands liberal construction by our own Supreme Court.

His Honor Judge Cushman feared that because actual deliveries had not been made that some of the other lien claimants might be affected, but we sincerely submit that His Honor did not give full effect to the repeated tenders of delivery to the receiver nor to the offer in open court that the court might, by an equity order, grant over to the receiver and thus by construction deliver all of this material at the building.

Had Judge Cushman exercised this equitable right we submit that even he would have left the material in storage rather than submit it to the Puget Sound weather in the winter months of the year.

This special material is at hand. It is an eight month job to repeat it or replace it. In order to

finish the building it must be obtained somewhere. With it at hand it not only enhances the building in the sense of present value, but in the sense that it would speed up completion of the building some eight months. It is, therefore, distinctly important to the remaining lien claimants that this material, as well as the terra cotta, which another lien claimant manufactured, be obtained for this building now so that a sale of the building will be the sale of a building with practically all of the gross and specially designed materials ready for placement.

We cite a few authorities that are well considered we believe on the question relating to the necessity of placing the material directly into the building. See *Evans Marble Co. v. Trust Co.*, 101 Md. 210, 60 Atlantic 667. Here the work of carving and cutting marble was done away from the premises and the plaintiff was not only to cut and furnish the marble but to completely put it in place and finish in place.

See *Emery v. Hertig*, 61 N. W. 830, a similar case under the statute giving a lien for performing labor or furnishing skill for the erection of the building.

See *Pittsburg Plate Glass Co. v. Leary*, 31 L. R. A. N. S. 746, in which the weight of authority is held to be that the actual use of articles furnished is not necessary where the lien is given for materials furnished for the construction of an improvement.

See also annotation to 1918 L. R. A. N. S. 1043, holding to the general rule we contend for.

See also 18 R. C. L. Subject Mechanic's Liens, Secs. 50 and 53, holding to the general rule that if the materials were not incorporated in the building by reason of the default of the contractor, a lien would still lie. (See particularly *note 3* at the bottom of page 921.) This being particularly true if the failure to use is due to the fault of the owner and the right to lien is not defeated when delivery is prevented by the act or direction of the owner. See Sec. 51, same citation.

We sincerely believe that this case turns upon a simple proposition of whether an owner can say to the fabricator of specially designed material "You place it in storage for me," and then, on his failure or arbitrary refusal to take it, the suggestion will be accepted that because it had not been delivered at the building site no lien attaches.

Our statute is peculiar in this regard. It does not require deliveries upon the building site. Its provision is one of "furnishing material to be used in the construction of any building." In California a somewhat similar statute was construed.

> *Tibbets v. Moore*, 23 Cal. 208;

In this case it was held that the lien accrues when the fabricator has the material ready for delivery to the place where he has agreed to make delivery. The court said:

> "The question is whether or not the word 'furnish' as used in the statute means de-

livered to the building in the construction of which the materials are furnished. We think such is not its reasonable construction."

If a certain place is designated and where the materialman parts with control thereof the furnishing is complete and a lien must be allowed. See:

Western Coal Mining Co. v. James, 33 N. W. 22 (Iowa);

Congdon v. Kindell, 73 N. W. 659 (Neb.)

A similar holding is found in:

Great Western Mfg. Co. v. Hunter, 16 N. W. 759 (Neb.);

King v. Cleveland Shipbuilding Co., 34 N. E. 436, (Ohio);

See also:

Clark v. Lindsey & Co., 47 Pac. 102; tl A. S. R. P. 479 (Mont.);

and as containing a summary of the above cases see:

McEwan v. Montana Pulp & Paper Co., 90 Pac. P. 359.

The City of Tacoma is a city of approximately 100,000 people. The corner on which this building is being erected is prabably the busiest corner in the city. Car lines parallel it on both sides and it is a transfer point. The city could not have permitted storage of this material around this building and certainly not of the quantity referred to in this lien. In modern cities of fair size it is wholly inconceivable that the material going into the construction of a sixteen story building could be de-

livered on the premises or at the premises, so that there must always be constructive deliveries in such cases.

If for the convenience of the owner it is stored across the street or in the alleyways what difference can this make over storage in a convenient warehouse for his protection and accommodation?

> *Foster Lbr. Co. v. Sigma Chi Chapter House*, 97 N. E. 801;
>
> *Atlantic Terra Cotta Co. v. Moore Constr. Co.*, 80 S. E. 924.

In this latter case the court clearly sets out the right to lien without incorporation or delivery to the building itself, as follows:

1. Where materials have been prepared or furnished as ordered and the owner refuses to accept or use them.

2. Where work has been actually performed in accordance with the contract there should be no loss of lien after the work has been stopped or abandoned in consequence of the default of the owner.

3. Where the work has been done by the contractor, under a contract with the owner, on material at the yard or shop of the contractor, with the express or implied consent of the owner, in which event it is said that the work of preparation and manufacture should be designated a part of the construction or furnishing, and in which case it is immaterial as between the parties to the contract with respect to a contractor's right

to a lien, subject to the final completion of the contract, that the work was not done on the premises.

In support of these propositions the following cases are cited:

Howes v. Reliance Wire Wks. Co., 48 N. W. 448, Minn.);

Burns v. Sewell, 51 N. W. 224, (Minn.);

Huttig Brs. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122.

The above case goes off on another point but the statement of the exceptions is fairly presented.

A case in which this character of the work is done is *Chicago Bond & Surety Co. et al.*, 181 N. W. 282 (Iowa), a case decided February 28, 1921, where the lien was for mill work especially constructed for the building in question. This case it seems to us is absolute authority for the point that mill work especially constructed in the shop of the contractor is furnished, within the meaning of the statute, even though there is no delivery, and at the time of the filing of the lien the material has not been incorporated in the building. It might be claimed that this case does not go as far as above stated because after bankruptcy the balance of the mill work undelivered at the time of the filing of the lien was put into the building, but the decision of the court does not turn on this point because this subsequent delivery and incorporation was under a special contract which was without prejudice to the lien right, this contract being made subsequent to

the filing of the lien, and the court flat-footedly holds that it is not necessary in all cases that the material would be actually used in the structure. It says:

> "We think it was furnished even when not actually delivered before the filing of the lien."

The Howes case and the case of *Lee v. Hoyt* are cited as bearing upon this matter as is the case of *Dickson v. Gray*, 8 S. W. 88, and from the citation of these cases, and others mentioned in the opinion, it is apparent the court goes the full length of holding that the stuff is furnished though undelivered where it is especially made for the building, and the fact that it has not been delivered is not in any wise due to the fault of the material man.

Upon the point that the lien is not defeated because the owner stops the work, see case of *Neilson v. Iowa Eastern R. R. Co.*, 1 N. W. 434, 33 Am. Rep. 124, cited in the Sheldon case supra, where the court says:

> "All the material man has to do under the statute is to 'furnish' the material for the designated use, this gives him a lien to the extent of the value of the materials furnished after the building or any part of it is constructed, it is immaterial whether the materials are used or not. If this be not so the owner might sell the material furnished and with the money obtained therefrom purchase other materials and erect the building therewith, and thus defeat the lien. Such a prop-

osition cannot we think be maintained and it was so held in *Esslinger v. Huebuer*, 22 Wis. 602."

To this same point is the case of *Straus v. Steckbauer*, 161 N. W. 259 (Minn.), where the court says:

> "The material having been furnished and used in the construction of the foundation in good faith by the material man, the lien attached when the material was delivered upon the premises * * * nor will such lien be defeated by an abandonment of the improvement."

The case of *Neilson v. Eastern R. R. Co.* (*Supra*) interprets some of the most important cases on this subject, the Howes case supra, and the case of *Berger v. Turnbald*, 107 N. W. 543, 116 A. S. R. 353 (Minn.), quoted in the Western Hdw. & Matal case, and also the case of *John Paul Lbr. Co. v. Hormel*, 63 N. W. 718 (Minn.), and the case of *Burns v. Sewell*, 51 N. W. 224, as well as the Thompson-McDonald case, hereinafter referred to. And the decision is strong in its holding that a lien for architects' plans will be given against the land, even though the construction is abandoned, where it is done by the owner of his own volition without fault of the architect.

One of the clearest cases and probably the best discussion on the question of delivery is the case of *Thompson-McDonald Lbr. Co. v. Morowitz*, 149 N. W. 300. This case should be read in extenso, as we think it is the best presentation of the ques-

tion of delivery to be found in any of the cases we have read. The general holding of the case is that all that is necessary to comply with the statute in the matter of delivery, is not actual delivery, but merely a delivery in good faith to the contractor whether that delivery takes place on the premises or not. It was said in that case:

> "The Minnesota court has held: 'We have also held that a delivery of material upon the premises is not necessary to give life to the lien in those cases where a delivery is deterred by the owner, this includes instances where the material is especially prepared in conformity with special orders." *John Paul Lbr. Co. v. Hormel*, 63 N. W. 718; *Berger v. Turnbald*, 98 Minn., 163, 107 N. W. 543, 116 Am. St. Rep. 353, and nothwithstanding expressions found in the opinions that delivery upon the premises is usually necessary, the logical result of our decisions leads to the conclusion that as against the owner, that material sold and in good faith delivered to the contractor and not used in the building entitles the material man to a lien whether the material be in fact delivered upon the premises or not. If it be delivered to the contractor for use in the construction it would seem a strain to hold, and clearly a departure from the logic of prior decisions, that the ma-materialman is bound to follow the contractor to the premises and see to it that the material is taken to and deposited thereon. Our de-

cisions are to the effect that if the material be in fact delivered upon the premises, the subsequent act of the contractor, even tho fraudulent, in removing the same and converting it to his own personal use does not defeat the lien. If such removal does not defeat the lien it is rather difficult to understand why the failure of the contractor, to whom possession has been given, to take the material to the premises at all should defeat the lien * * * If the material in a given case be delivered in the possession of the owner it seems clear that no court would hold that his failure to deliver the same upon the premises would affect the rights of the material man. We can conceive of no valid reason for applying a different rule where the delivery is to the contractor, the agent and representative of the owner, and for whose acts the owner is responsible to the extent at least that the premises are liable, under the statute, for the value of the material so furnished."

The case of *Howes v. Reliance Wire Wks. Co.*, 48 N. W., frequently referred to above, is important not only upon the question of actual delivery or delivery at a place designated by the owner, but not the building, but also upon the second alternative mentioned in the above analysis, i. e : assuming that there was no delivery at all, a tender of delivery would be sufficient to start the lien. In that case the Reliance Wire Works agreed to furnish

and put into position in the building a wire enclosure for the elevator. They proceeded to do the work by preparing this wire enclosure at their own shop and as soon as they had knowledge of the sale of the place and transfer to plaintiffs, they notified the plaintiffs of the contract and their readiness and willingness to deliver and put into position in the building the elevator enclosure which had been completed by them ready for delivery. The defendant i. e., Reliance Wire Wks., also formally tendered a performance of the contract in this particular which was expressly refused by the plaintiffs. This is all the delivery that was made, in fact there was really no delivery, but simply a tender of delivery. The court says that:

> "In these days a large portion of the material furnished for the construction of buildings, such as inside finishing, is prepared at the yard or shop of the contractor with the implied consent of the owner. Such work of preparation should be deemed part of the construction or 'furnishing' under the contract. It differs from a sale of merchantable articles or gross materials undelivered and which are of general utility. Of course if materials so furnished on construction by the contractor are diverted to other purposes by the contractor, or the contract is not completed, no liability can finally be enforced. It is otherwise where this occurs through fault of the owner of his assignee. It is true that the

> lien is based on the theory of increased value of the premises caused by the work or materials furnished, but where the work is interrupted or materials diverted through the fault or act of the owner, obviously the rule cannot be applied technically to defeat the lien."

The court allowed a lien to the extent of the actual loss sustained by the failure and refusal of the assignee of the original owner to allow the defendant to complete the contract.

Mr. Oakley used in the lower court certain cases, among them the case of *Barnett v. Stevens*, interpreting the word "furnish" as follows:

> "In order to furnish material for a building there must be either an actual or constructive delivery of the material at or near the building."

Evidently this language is confused in that the words "or constructive delivery" might necessarily be made anywhere.

The following cases are pertinent and establish the view that it is not necessary to place the material upon the building.

> *Evans Marble Co. v. Trust Co.*, 60 Atl. 667 (Md.)

In this case the contractor was to carve and cut the marble at a place known to be away from the premises, but was to complete it, put it in place and finish it in place. Delivery was not made.

See also

Every v. Hertig, 61 N. W. 83.

The distinction to be found in the words used in the various lien statutes is commented upon in the case of *Pittsburg Glass Co. v. Leary*, 31 L. R. A. (N. S.) 746, and it is there held that it is not necessary that the articles be actually used where a lien is given for the material furnished for the construction of and improvement.

Exhaustive notes on this subject will be found in L. R. A. 1918 D, 1043, and in this note the Colorado statute, which provides for furnishing of materials to be used in the construction of a building, is found.

See

Rice v. Castles, 108 Pac. 101;

Salzer Lbr. Co. v. Lindemyer, 131 Pac. 442.

We are of the belief that this court is constrained to follow the holding in the Minnesota cases, which approve constructive deliveries, since these cases have been definitely adopted in the *Western Hardware Co.* case by the Supreme Court of the State of Washington. We are confidently of the belief that this court will see the necessity of holding that constructive deliveries in specially fabricated material is the only doctrine that will protect such fabricator.

It is evident from a fleeting glance of the testimony of the experts for this appellant that such material is waste instantly that it is partially fabricated. Impliedly, therefore, the law delivers into

the hands of the owner this material when once fashioned.

The good faith of the Tacoma Millwork Supply Company is evident from the start to the finish of their contract. The decision of the lower court leaves this waste material on their hands, with a great bulk of the $65,000 represented in labor expended.

Where and in what particular has this appellant defaulted?

It completed its contract in time. It tendered deliveries in time. It stored at the direction of the owner, and certainly, at least, with his consent. It offered the court the right to enter an equity order transferring this material to the receiver of the Building Company.

But for the default of the owner this material would now be an integral part of the building. This is an equity court and our appeal is one that surely should reach the conscience of its chancellors.

Will counsel on the other side intimate, that with the far reaching powers that an equity court has, that this court could not devise a method to do equity in this situation to all?

The building is in need of this material. Placing it there under proper protection will enhance its value and will give added value, since the material is now ready. A favorable decree would, therefore, not only do equity, but would augument for the

better the standing of the other lien claimants on sale of the building.

This is not gross material that can be picked up anywhere or resold on the open market. It is specially designed. It must be remanufactured in exactly the same quantity and approximately the same price. It seems wholly inconceivable to counsel that under the circumstances detailed this appellant should suffer a loss of over $60,000, with no fault traceable to it, in any sense of the word.

Suppose, Your Honors, that thirty days after commencing the cutting on these designs the building company had failed and one-third of the work had been done on the fashioning of the material; that under the evidence no suggestion of delivery would have come because none of it was ready for delivery. Will counsel on the other side intimate to this court that the fabricator is without remedy in equity under a statute that says, "to furnish material for use in the construction of a building?"

We sincerely believe and urge with conviction that this appellant is entitled to its lien in full.

Waiver of Lien.

This subject is treated in pages 23 *et sequor* of of this brief, under the testimony, principally, of Mr. R. T. Davis, the manager of the Millwork Company, and his brother, George Davis. The manager, after discovering the waiver of lien clause and before signing the contracts, drew a rider reviving the lien in the event the Building

Company defaulted in payment, instructing the brother not to turn over the contracts unless the rider was accepted (Page 24) of this brief. The brother was then assured that the Building Company had $400,000 cash on hand; had a definite committment for $600,000 of mortgage monies; that the terra cotta people and the steel people had already signed identical contracts waiving the liens (Record p. 696) among other representations, and that with these assurances the Millwork Company delivered the contracts, submitting to the waiver of lien and relying upon the statements made. (Record pp. 699 and 700). The brother says that Mr. Drury and others told him that they had $400,000 on hand and $600,000 for completion monies; that if the contract was broken, as Drury said, the waiver would not hold; that the eastern finance people demanded this form of contract and they all must be alike. With these assurances the riders were detached. (Record pp. 705-707).

This evidence was verified by Miss Carlson, secretary to Mr. Webber, the architect, and by Elmer E. Davis, another contractor. That there was further representations that the $600,000 was a first mortgage on the property and that the building company was the full owner of the property subject only to this mortgage.

Mr. Davis, the manager, says that after the failure of the bank he found that the building company did not have $400,000 nor any appreciable part of it and did not have a committment on the

$600,000 mortgage. (Record p. 703). It is also in evidence that the McClintic Marshall Company and the Washington Brick, Lime & Sewer Pipe Company had distinctly reserved their liens at this time (See Exhibit F and 136, this brief page 25). Under these circumstances such a fraud was committed in the inducing of these contracts from the Millwork Company that the lien must naturally revive itself. It was distinctly represented, with full knowledge of the fraud, that $400,000 was at hand, out of which payments would be made and that $600,000 was a committment and was for completion monies.

A waiver of lien or an agreement rather to waive a lien is merely a contractual situation which must be supported by consideration and must be like any other contract free from fraud. In this case the real consideration for the waiver of lien was the agreement to pay these monies at stated times out of monies represented to be on hand. Consideration for the waiver was the substitution of these funds definitely as at hand. The money was not at hand, the mode of payment could not be followed, and the consideration for the waiver is therefore absent.

On the other hand the fraud which was perpetrated is so clear and succinct, it is no where in any wise refuted and it must now be admitted that these fraudulent representations relied upon by Davis and his brother were the inducing cause to the agreement to waive the lien; they were rep-

resentations of material facts, without belief in which the Millwork Company would not have proceeded; they were known to be false as to the $400,000; they were known to be false as to the waiver of lien by the terra cotta people and the steel people, and any business man should have known that the commitment, so called, was not a commitment, but a tentative offer of monies on conditions which were already broken in part when the Millwork Company's contract was signed. We are fully entitled to a re-establishment of this lien. See citation *Vansciver v. Churchill*, 35 Pa. Sup. Ct. 212. The court said:

> "We are not without authority that a covenant against liens procured by fraud will not be enforced."

In *Bollman v. Hermer*, 160 Pa. 377, it is said:

> "If the contract is not made in good faith, but is entered into for the purpose of misleading and so defrauding sub-contractors and material men, it should be held invalid because of fraud."

Citing among others *Bohme Bros. v. Seel*, 185 Pa. 382.

In the Vansciver case the owner falsely stated at the time of contract that each of the three properties to be set aside as security to the plaintiff was subject only to a mortgage of $1600, while at the time there was another mortgage of $25,000. There was other evidence of fraud to the effect that Churchill was not in actual control of these

properties and therefore could not set them aside as security to the plaintiff as he agreed to do when he procured the covenant against liens. The court said:

> "We think it is ample evidence to warrant the jury in finding that the contract against liens was void on account of the fraud practised by Churchill which induced the plaintiff to execute it."

In *Katzenbach v. Holt*, 12 Atlantic 383, the court will find a case almost similar to the one at hand. In that case Katzenbach & Co. held a mechanic's lien on Holt's property. One Manning had a mortgage which was secondary. Holt said to Katzenbach that if they would release their lien Manning would take a new mortgage for a larger amount and would endorse for Holt at the Bank, and that Holt would in this manner out of said mortgage and endorsements pay the liens. On the faith of this the release was made and delivered. Manning admitted that he had made such promises to Holt, but Manning, after receiving the mortgage and endorsing for a certain amount refused to endorse further. In the meantime Katzenbach had inquired of two officers of the bank which held some of Holt's paper, for which Manning was liable, as an endorser, as to Holt's standing and was induced to believe that he was in good condition. Katzenbach at that time explained to the bank the reason for his inquiries, going into detail as to the lien and Holt's plan. Shortly after the last loan

was procured by Holt, on Manning's endorsement, from the bank, the bank secured an assignment of the mortgage, referred to herebefore, from Manning as collateral. The court held that the bank could not plead this release of lien both because of the absence of good faith and because there was no valuable consideration. The court further stated:

> "I am lead to the conclusion that Mr. Manning cannot in equity be permitted to plead such release and ought to be enjoined from doing so at law, if such promises can be enforced affirmatively by third persons most assuredly they can be negatively."

In considering the bank's position the court said:

> "In the eye of the law they (the officers of the bank) perpetrated a wrong upon the claimants and can claim no benefits from the transaction."

And again:

> "The bank did not take the assignment until after all the papers that Mr. Holt offered, with Mr. Manning's endorsal, had been discounted and placed to Mr. Holt's credit."

And comments upon this that the bank gave "not the slightest consideration which the law requires in such cases."

This doctrine is well presented in the case of *Seattle Lbr. Co. v. Cutler*, 63 Wash. 662. In that case it was held that where the controversy is between the original parties that failure of consider-

ation for obtaining the waiver of lien, if proven, may re-establish the lien.

In *Central Trust Co. v. Richmond * * * Co.*, 41 L. R. A. 458, Justice Lurton, sitting then as a Circuit Judge, held to the doctrine we are contending for, said:

> "It may be admitted that lien laws do not in general creat a lien in favor of one who accepts in full a different security at the time the contract or agreement is made, or who has entered into any certain agreement which manifestly indicates a clear purpose and intention to waive the benefit of the statutory lien * * * but it is clearly well settled that though the owner obligate himself to give a security inconsistent with the intention that a mechanic's lien should exist, or where the contract is to pay in land or other specific article of property, yet if the owner fail to fulfill the agreement for such mode of payment or for different security it will not be taken as an agreement to waive the mechanic's lien in case payment is not made in the manner provided for * * *

Citing:

> *Grant v. Strong*, 18 Wall. 623.

Citing from *McCleary v. Brown*, 91 U. S. 266, the court lays down this doctrine:

> "If the labor has been performed or the materials furnished no matter in what the owner agreed to pay, if he has not paid in any

> way the laborer or mechanic has a right to resort to the security provided by law unless the rights of third persons intervene * * *

In the case of *Southport Canal Co. v. Gordon*, 18 L. Ed. 894, the court found that a release of lien was obtained by the company from a partner under a situation amounting to gross fraud and held it to be without any effect whatsoever in so far as it affected the partnership relation to the company.

The owners did not seek waiver of this lien, but in the testimony, the eastern syndicate sought this waiver. The first mortgagee alone, therefore, namely, the Metropolitan Life Insurance Co., can plead such waiver.

Paulson v. Wauke, 18 N. E. 275.

ARBITRATION.

The contract provides for arbitration, but this, of course, may be waived. The evidence shows that when Mr. Davis asked the president of the Building Company what should be done, after the failure of the Bank, he replied there was nothing to do but to file the liens and impliedly go ahead. (Page — of Record.)

STATUS OF $600,000 MORTGAGE.

In this connection the first question that meets one's consideration is who is seeking to establish this $600,000 mortgage in whole or in part? Of course it is the Bank, through the receiver. Then

comes the question, did it pay consideration for this assignment of mortgage, and if so, whether there are any matters in estoppel that militate against its use by the Bank as collateral?

On the question of consideration:

On October the 7th, when it took the assignment of this mortgage from Simpson, the Building Company did not owe the Bank a cent by the way of loans. If there were any overdrafts at that time it was a past consideration. On December the 9th for the first time does this mortgage appear of record as among collateral of the Bank. On that day the loans which, at the date of November the 8th, stood at $150,000, were increased to $200,000, so that on that day when for the first time the Bank asserted a claim to this mortgage as collateral, as far as its records show the amount advanced of new money was $50,000. On this date, however, the overdrafts had accumulated.

If, therefore, we take the assignment date October the 7th as the date in which the Bank acquired title to this mortgage, if it ever did, all advances including overdrafts had already been made and it therefore paid no consideration for this mortgage. In this particular it is well to consider that while this is not a bankruptcy proceeding, the four-month period of inhibition as to previous transfers should in moral law apply because, under our statute, the proceeding taken by the Bank Examiner is the only one available and is exclusive. If the later date of December 9th is taken as the time

the Bank acquired this mortgage as collateral, then of course the only new money that was advanced at that time was $50,000, and this of course was within the inhibited period as well.

It will therefore be seen that insofar as new money is concerned $50,000 is the total limit as to which the Bank might claim consideration. But there was an overdraft at that time still to be taken into account.

However, we do not need to consider this point any further for the following reason: the Bank was imbued with notice of all the chicanery and fraud that had gone before, was imbued with notice that this mortgage represented a trust fund useable for specific purposes and none other.

In this connection we go back at once to the representations made to the Davis boys, viz: that this mortgage was for completion monies, was a first mortgage upon the property involved, and that its monies would be expended solely for labor and material in the final completion of the building, and that the Building Company had ample funds to be known as the primary funds and had $400,000 on hand. Who made these representations? It was Drury and Larson, and these two men, one the president of the Bank and the active worker in the Building Company, and the other the chairman of the board of directors of the Bank, and the president of the Building Company. Again Mr. Sheldon was secretary of the Building Company and the vice-president of the Bank. He testi-

fied that both boards let Larson and Drury do it all. Williamson testified in like effect; Lindberg so testified. Chilberg was away most of the time, Jafet Lindeberg was away a great part of the time. Thompson was sick during the entire period. Lamborn stated that they left everything to Larson and to Drury, and so we come to this conclusion that these boards of directors acquiesced in all that Larson and Drury did and are bound by their representations made in the ordinary course of the business. The representation that this was a first mortgage was made by both Larson and Drury repeatedly. The representation that they had $400,000 on hand was also made repeatedly by Larson and Drury to these contractors. Drury knew better as did Larson, but Drury, in order to execute the purposes he was engaged upon said to R. T. Davis: "If you have any doubt about our having the money on hand I will take you down to the Bank in the morning and you can draw money in advance." And the following morning he received $15,000 on his contract, and Larson okehed the extensions on the note which was after Drury represented tentatively that the $15,000 would be applied on the final end of the contract. The status of this mortgage, therefore, is definitely fixed in our judgment as a first mortgage upon these properties, the proceeds to be used solely for completion monies, and the Bank is absolutely estopped from using this mortgage in its protection and for its benefit because of the representa-

tions made by its own agents in the interest of a company that it owned. This question will be considered in its law phases in the next subject. Finally Larson admits that the only reason he took over this mortgage was because he feared that Simpson might die and that the mortgage might become entangled in Simpson's estate.

(See page 13, this brief, Record p. 1005, *et sequor*, and particularly Record pp. 1049-1050).

THE MORTGAGE FOR $600,000 WAS NOT A CONTRACT FOR FUTURE ADVANCES.

This mortgage, under the tentative so-called commitment was not a contract to give over monies definitely at fixed times and under an obligation under which the Metropolitan Life Insurance Company was bound. It is therefore not prior to the mechanic's liens.

See *Ray v. McClellan*, 124 Mass. 92.
Aliss-Chalmers Co. v. Central Trust Company, 190 Fed. 700.

THE CONTRACT IS AN ENTIRE CONTRACT.

The contract itself decrees that it is indivisible and in entire.

On the question that this is an entire contract the general rule is that the intent of the parties will govern. See *Toellmer v. McGinnis*, 24 L. R. A. N. S. 1082:

> "The safest and best course is to ascertain what was the intention of the parties from the instrument they have executed."

In the case of *Chamberlin v. Booth and McLeroy,* 25 L. R. A. N. S. 1223, the court says:

> "If a general rule be subject to many exceptions where a contract requires successive steps * * * the covenants which relate to the taking of these steps are mutual and dependent."

In the case of *Davidson v. Gaskill,* 38 L. R. A. N. S. 692:

> "The rule is that where one party contracts to do certain work, and the other to pay a certain price for the same the contract is entire."

In 13 Corpus Juris, page 569, Subject Contracts, section 538, the doctrine is that agreements are mutual and dependent where performance by one party is conditioned on and subject to performance by the other. It is held that intention is the true test "to be determined from the sense of the entire contract rather than from any particular form of expression." And in case of doubt covenants are construed as dependent since such a construction ordinarily prevents one party from having the benefit of the contract without performance of his own obligations. *Lowker v. Bangs,* 17 Law Ed. 768.

In our case in addition we have the expression clearly put that this contract is held to be an indivisible and entire contract. This appears in the article relating to installment payments.

Unity of Corporations.

This subject is treated of at pages 8 and 9 *et sequor*, of this brief and in the Record at pages 978, 1102, 1103, 1125, 1136, 1147, 1153, 1159, 1033, 1042, 1084, 1093, 1172, 1174.

Distinguishing between a doctrine of unity of corporations and notice or knowledge brought home to a corporation, we submit that the Building Company having been organized by the Bank for the sole purpose of limiting liability, it became of course merely a shadow or representative of the Bank. But its governing officers were Larson and Drury, and these were the principal officers of the Bank and were the controlling spirits of the Bank, and, as the evidence showed on the witness stand, practically everything was left in the Bank to Larson and Drury, and particularly to Larson. So that anything in the ordinary course of business that arose in the Building Company must of necessity have been known to the Bank, by the doctrine that where the agent or agents are the sole representatives of both parties in the given transaction, each party must have had equal knowledge of any situation coming forward. This is held in *First National Bank v. Blake*, 60 Fed. page 78, and again in the case of *Emerado Farmers Elevator v. Farmers Bank*, 29 L. R. A. N. S. 567. There is cited the case of *Niblack v. Casler*, 74 Fed. 1000. In the parent case they deal with this specific rule:

> "That in any event the rule above referred to that the principal cannot take the benefit

> of the transaction conducted by its agent obstensibly on its behalf without assuming full responsibility not only for his acts but for knowledge, applies with all its force."

And the doctrine of sole agent overrides the doctrine that if such agent is acting adversely the Bank would not be bound.

It was suggested by counsel for the Receiver that the minutes of a corporation alone furnish the evidence of corporate acts and corporate authority, but in the case of *Woods Lumber Co. v. Moore*, 11 A. L. R. 553, 554, this doctrine is overturned. The court said, quoting from another case:

> "If a corporation allows its officers to continue its business and third persons act upon apparent authority it is shown it cannot defeat the rights of such persons arising from transactions done and completed under such obstensible authority by failing to enter upon its minutes any order giving its officers authority to act."

In the case of *Cook v. American Tubing Co.*, 9 L. R. A. N. S. 211, the court in quoting from 4 Thomp. Corp., Secs. 5192 *et seq.*, says:

> "Knowledge acquired in a previous transaction being present in the mind of the agent when acting in the particular transaction. In like manner the Supreme Court of the United States have held that the rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the

> agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present in his mind at the time when he is acting as such agent, provided it be of such a character as he may communicate to his principal without a breach of confidence."

Citing *Harrington v. U. S.*, 20 L. Ed. 167, the court again refers to the subject that if an agent is acting adversely to a Bank such notice cannot be imputed. The court however, said, after recognizing this subject in the case of *First National Bank v. Blake*, 60 Fed. 78:

> "But there is no room for the application of this principle where the agent is the sole representative of both parties in the transaction. * * * If he was the sole representative of each party each must have had equal knowledge."

Citing many cases, among others *Waynesville National Bank v. Irons*, 8 Fed. 1, the court speaking of the case of *Morris v. Georgia * * * Co.*, said:

> "Where an individual has an interest in a promissory note which he knows was given without consideration, such individual, as cashier of a bank, having full authority of the bank without reference to or consultation with any other officer of the bank, discounts such note with the funds of the bank, the latter is

not a bona fide purchaser of the note without notice."

In *Brookhouse v. Union Publishing Co.*, 2 L. R. A. N. S. 993, while this case turns upon the point that the interest of the agent was adverse the reasoning of the case is in our judgment worth great consideration, for it points out the exceptions and distinctions, and the particular objection is the one that the bank would not be held when the agent is engaged in this manner in an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. In our case of course the acts of Larson and Drury were in the interest of both the Building Company and the Bank and in no sense in the interest of either individual excepting indirectly and incidentally as they were interested in both institutions.

The case of *Emerado Farmers Elev. Co. v. Farmers Bank*, 29 L. R. A. N. S. 567, holds in this case a cashier of the bank, who had entire management, control and conduct of its affairs, and particularly of the receiving and disbursement of deposits through checks on an elevator company of which he was treasurer, payable to the bank, presented such checks and paid them himself misappropriating the funds, the court held the bank to have had full knowledge of the fraud. Citing *Niblack v. Cosler*, 74 Fed. 1000. The authorities on this subject are quite carefully collected in an annotation

to *Wheatherby v. Texas & O. Lbr. Co.*, 7 A. L. R. 1446 *et seq.*

In the *Wheatherby* case the court concludes with this comment:

> "If he had acquired this notice while acting for himself in his own private business affairs it would not be imputed to the Texas & O. Lbr. Co., but since he acquired the notice while transacting business for the lumber company, such notice was in law imputed to the company."

In our case Ole Larson and Drury were in each act of theirs operating as well for the Bank, since the Bank owned the Building Company, as for the Building Company which was but a tool or cloak for the Bank.

Status of $70,000 Mortgage.

We do not wish to take much time on this subject, since we think that Judge Cushman has reached the real solution on this in that the Bank gave a full warranty deed to the Building Company, which went on record, it was therefore encumbent upon the Bank sooner or later to cancel this mortgage. It is now attempting to foreclose that mortgage against the estate of the Building Company in the face of intervening adverse rights on the part of the lienors.

We want to make this point, which we think has not been forcibly enough presented to Your Honors, viz: that even prior to the payment of this mort-

gage the Bank had already provided for its cancellation. We do not mean by the check for $70,000 that was taken east by Mr. Larson, but in a totally different manner which is clearly evident from Mr. Ogden's testimony. He was the cashier, if Your Honors will remember.

When counsel was interrogating him upon the question of when he first saw the note for $350,000, he said that it was shortly after the failure of the Bank. Two sums make up this $350,000, one $280,000, the equity in the building, the other $70,000, this mortgage. We cite pages 738 *et seq.*, testimony of Mr. Ogden. And Exhibit No. 235 was introduced at page 742, on that page: These page references in the Ogden and Sheldon testimony are from the original record. We took the liberty of quoting the exact language because of its importance:

> "Q. 'Referred to in this Exhibit 235, which makes up a part of that $9,000 interest charge; interest on banking house investment, 6% on $350,000 from December 1st to December 31st, 1920?'
>
> A. 'Yes, that is the amount for which they carried the banking house.'
>
> Q. 'That is the old banking house?'
>
> A. 'Yes.' "

Mr. Oakley then shows Mr. Ogden at page 745, Exhibit 226, a statement of the Bank at the close of business May 4, 1920, "And call your atten-

tion to the item there $280,000; what does that item represent?

> "A. 'That is the investment in the two corner lots, less $70,000 mortgage on the lots.'"

This is exclusive of the Drury lot which was rated at $65,000. Mr. Ogden repeats, at page 749, this situation in this manner:

> "A. 'Well, on the report of the bank commissioner, the lots were put in at $350,000 less the $70,000 mortgage, showing the Bank's investment of $280,000.'"

Mr. Sheldon clearly shows now that this $70,000 mortgage was arranged by the Bank to be paid out of the $350,000 second mortgage bonds, which was the total investment in the building according to the Bank's own records, *conditioned that they paid the $70,000 mortgage.* Mr. Sheldon says, page 752:

> "A. 'The bonds had not been delivered to the Bank according to the agreement between the Bank and the Building Company, and the Bank was holding nothing at the time; that was the reason the note was executed, so that the Bank would have something to show for the deed that they had deeded.' (Meaning the Warranty Deed.)
>
> Q. 'Isn't it a fact that it was and did represent, and its purpose was to evidence the $350,000 second mortgage bond?'
>
> A. 'The note never would have been used if the bonds had been delivered.'

Q. 'How did you make it up?'

A. 'What is that?'

Q. 'How did you make it up, the total?'

A. 'If I remember correctly, it was $350,-000 with some interest on it.' "

Further, at page 754:

"Q. 'This note was not given over to represent a loan or anything of that kind?'

A. 'Not if the bonds were delivered, no.' "

At page 753, Mr. Sheldon says: "The second mortgage bonds were to be $750,000." Deducting the $400,000, that the building company claimed it had, which it is apparent from later testimony was in their minds, would be derived from this differential in second mortgage bonds, leaves $350,-000 second mortgage bonds.

Without attempting to take any more of the court's time on this matter, it is significant that the Bank had already arranged to take for its protection second mortgage bonds for this Penn-Mutual mortgage. It was, therefore, a simple matter for it to give a warranty deed at the time. It did not in the meantime obtain the mortgage bonds, but it did obtain this note of $350,000 plus interest that both Ogden and Sheldon spoke of, in lieu of and as an interim substitute for the bonds. It already had a certificate for such bonds.

"A. 'The note never would have been used if the bonds had been delivered.' " (Page 752 testimony of Mr. Sheldon.)

The Bank, had it received the second mortgage

bonds, would have been in the position it is today so far as these lienors are concerned. It had warranted the building and as against them its $350,-000 of second mortgage bonds would have been subsequent. It put itself in the status not of a lienor, but of a simple creditor when it took the $350,000 note, unless in equity that note might be tied in to the second mortgage under the reference made on page 743 to language on Exhibit 235. In that event of course it would be simply a note secured by the same type of second mortgage and subsequent to the lienor's claims.

Thus it appears clear that in good faith this Bank gave this warranty deed under an arrangement that it would be fully protected by second mortgage bonds wiping out the $70,000 mortgage. This arrangement was made before February 20, 1920, when this lienor did its first work. See page 17 of this brief, Record p. 1005, *et sequor*, and particularly pages 1034-35 and the resolutions authorizing the president and cashier "to execute and deliver to said Scandinavian American Building Company a warranty deed of conveyance to said Lots 11 and 12, in Block 1003, Map of New Tacoma, W. T., upon receiving from said Scandinavian American Building Company a certificate * * * agreeing to deliver to said Scandinavian American Bank of Tacoma * * * bonds of the par value of $350,000."

It needs no argument on both these mortgages to convince the court that in the $600,000 mortgage

we have a trust fund for the completion of this building and that as to the $70,000 mortgage the Bank had the certificate for the $350,000 of second mortgage bonds and had granted a warranty deed to the Building Company. Upon this title and this state of facts this appellant relied.

Status of Millwork Company's Material and Labor.

As previously stated, we believe we are entitled to a full lien for material on the $65,000 contract; we would be in the relation of labor work similar to that of E. E. Davis, the erector of the steel on the $31,266 contract, and we would be straight out subcontractors on the Bank fixtures contract, amounting to $2,100.

It was suggested by Mr. Metzger in the lower court that because we both fabricate and agree to erect the general contract for materials, that that makes us a subcontractor. In other words, that though we carefully entered into *one contract for fabrication* in contemplation that the *other one was also to be entered into for erection*, and *entered into a third one at the same time practically which was to be for fabrication and erection both*, that they must all be thrown into a hotch potch and considered as one contract. The simple statement of this situation we think should settle the matter; that under the material contract we are compelled to give one type of bond, having certain conditions, restrictions and penalties, under the erection contract we had to give another type of bond with

different restrictions and penalties, and so with the third and subcontract.

It is axiomatic that the law will presume that the contractor had in mind the benefits arising on entering into a different status when he executed the three different contracts. It is further suggested that the use of the words: "put in place" in the material contract suggest installation. It is our contention that that simply means delivery at the place for erection. First of all we can answer this by stating that the material contract was entered into in contemplation that there would be an erection contract. In the erection contract, Your Honors will find in substance this expression: "It is understood that the owner will set the window frames and furnish and set the door bucks and grounds." The material contract itself says in substance: "Owing to the great quantity of the work and our limited storage facilities it will be necessary on this account for you to provide dry storage space and accept delivery as fast as manufactured." The general contract says: "Furnish you with all the millwork." It is also significant that the fabrication contract and the erection contract ran concurrently. In this particular it might also be suggested that there was a $50 penalty per day, and one can readily see why the Millwork Company was urging Wells to take delivery. The erection contract does not use the words "put in place," but says in effect: "All work as mentioned to be delivered and erected."

In *Neary v. Puget Sound Engineering Co.*, Vol. 14, No. 1 Advance Sheets, Wash. Decisions, page 18, we find this: In that case, by contract, Harmon was bound to deliver the material on the work as directed and required. The question was, was Harmon a subcontractor? He was delivering gravel. The court said:

> "In many cases, under modern conditions, material men deliver their material upon the works where it is to be used * * * *at the place where they are to be put into the building.*"

We cite this language merely to show that it is practically in harmony with the language used "put in place." Harmon was held to be a material man. Another very distinguishing feature is that the material man's labor workers fabricating the material would have no lien under this case.

Speaking from another case, in the parent case, the court said:

> "Bates merely furnished the sand and gravel used in the work just as someone else furnished the cement, and someone else the steel. If he was a subcontractor then every material man would fall within that class, and the distinction manifestly intended by the statute would be obliterated."

More pertinent in this case: *Findley v. Tagholm*, 62 Wash. 341, the court says:

> "If one who furnishes the sashes, doors and glass for a building is a subcontractor, every

material man would fall in that class, and such construction would nullify the plain terms of the statute."

Suit on Contract or Quantum Meruit or For Foreclosure of Lien and Reformation of Contract by Reviving Lien.

We merely cite on reformation the cases of:

Walden v. Skinner, 101 U. S. 577.

Hunt v. Rousmanier, 8 Wheaton 174, 211.

34 Cyc. 912, Subject, Fraud.

Dolvin v. American Harrow Co., 28 L. R. A. N. S. 785.

We have already submitted the doctrine of law that in an equity cause a plain statement of facts will give relief under general prayer for relief that the party is entitled to in a judgment of the chancellor.

We did say, at page 381 of the record, in answer to a statement by Mr. Oakley: "They are relying upon this contract and I think the contract prices should control."

> Mr. Flick: "We are not relying on the contract, Mr. Oakley. There will be no question but that the contract was breached by them and we are not relying on it."

Then on the same page we suggested to the court that the reasonable value is less than the contract price. (These two page references are from the original record).

The Millwork & Supply Company thereupon was putting its testimony in on the basis of reasonable

value, but in no instance in excess of the contract prices. Mr. Metzger suggested in the trial court that we must either sue for reasonable value or under the contract, but his own case, upon which he relies in large extent for one principle, viz: that we could not rescind as to some provisions and not as to others, holds that there is yet a third mode of procedure, viz: a general suit for enforcement of mechanic's lien. We cite from the case of *Girouard v. Jasper*, 106 N. E. 850, submitted by Mr. Metzger:

> "The petitioner does not contend that he was fraudulently induced to enter into this provision of the contract and as he has waived the fraud, if any existed, relative to the existence of the mortgages, he is bound by all of its terms."
>
> "On discovery (of fraud) he could have rescinded it as a whole and have brought an action at law for his breach, or he might have brought an action declaring upon a *quantum meruit* * * * or he could have availed himself of the remedy provided for the enforcement of a mechanic's lien to recover for the value of the labor and materials furnished."

The *Girouard* suit was one in which fraud is held to have been waived. In our suit the fraud has not been waived. The very foundation of the suit is the plea of fraud and misrepresentation inducing a contract wholly different from that which would have been executed by the lien claimant had

it known the true facts. We are familiar with the principle that one cannot ordinarily rescind in part and still get the benefits of the contract, but that is ordinarily a law situation and not a rule governing an equity suit, for in almost every equity suit where reformation is sought there is an approval and rejection in part. If this type of suit were not permissible one would have no reformation cases.

Ordinarily a failure to make interim payments will not abrogate an express lien waiver. This must be based upon the presumption that these are divisible items in the particular contract, or that the interim payments, by the wording of the contract, are not connected in any way with the lien waiver. See *Dux v. Rumsey*, 190 (Ill.) Appeals, p. 234. This was a subcontract case with undoubted rights intervening on the part of the owner and others. No fraud is pleaded or proved, no overreaching is suggested, no reformation is asked for, and the suggestion gathered from the case is that the lien waiver was not an independent covenant, and there was but a promise to pay in the ordinary way without reference to any particular mode of payment.

This case differs radically from our case in the many features just mentioned. A partial rescision may be allowed where the contract is of such character as our contract is held by the cases cited in 6th Ruling Case Law on Contracts, Sec. 318.

The *Rumsey* case is cited in 13 A. L. R., p. 1081.

In that same volume and the same annotation the authority is found upon which we rely in part, known as *Vansciver v. Churchill*, 35 Penn. Sp. Ct. 212, to the effect that where an owner falsely represents to a contractor that the property or securities out of which he was to pay the contractor, that the covenant against liens so obtained would not be enforced (see p. 1089). The doctrine of this case is re-affirmed in a number of Pennsylvania cases.

Ballman v. Heron, 160 Pa. 377;

Bohem Bros. v. Seel, 185 Pa. 382;

and particularly the statement by Justice Lurton, sitting then as a circuit court judge in 41 L. R. A. 458.

In this connection it is well to state that without allegation of fraud, its proof and request for general relief, we could not sue under the third mode suggested in the *Girouard* case, viz: general suit for foreclosure of lien.

See also

Rolevitch v. Harrington, 6 L. R. A. N. S. 550.

Again in the *Medical Society* case, 208 Fed. 899, citing the well known equity rule the court said in effect, that a Federal court is empowered to give such relief as the justice of the case demands in the eyes of the Chancellor, at any stage of the case, in the face of mistake in procedure.

In the case of *United States v. Behan*, 110 U. S., at page 171, the court said:

"In a proceeding like the present in which the claimant sets forth by way of petition a plain statement of the facts without technical formality, and prays relief either in a general way or in an alternative or accumulative form, the court had not ought to hold the claimant to strict technical rules or pleading but should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to if within the fair scope of the claim as exhibited by the facts set forth in the petition."

Again:

"Where a writing, owing to a fraud of one of the parties and mistake of the other, fails to express the agreement at which they arrived, reformation will be allowed."

(Vol. 3 Williston on Contracts, Sec. 1525.)

"The grounds for the reformation of an instrument are that it fails to express the intentions of the parties thereto as a result of mistake, fraud or inequitable conduct. * * *"

(23 R. C. L. Reformation of Instruments, Sec. 14 and Sec. 21.)

Particularly is this true "If reformation is essential to protect from injury the innocent party thereto." Citing *Phoenix Ins. Co. v. Bailey*, 13 Wall. 616; *Dickson v. Patterson*, 160 U. S. 584.

And

"Whether the deviation from the agreement is the result of intentional or unintentional

misstatement of the defendant is immaterial for equity has power to correct it as well in the former as in the latter case." (Id.)

So taking these authorities under consideration, if it is insisted that we are suing on the contract, it is a simple matter for Your Honors to reform the instrument by striking the waiver of the lien clause which was inserted in the belief that all would be treated alike and that two funds were at hand and available out of which specifically this lien claimant and the others would be paid, 1st: the $400,000 cash fund; 2nd: the $600,000 mortgage commitment fund. Once the instrument is reformed the rights of these lien claimants to sue upon the instrument could of course be granted. The pleading suggests "reasonable and agreed prices." The exhibits clearly portray the prices which, as the evidence shows, are practically the contract prices, which are likewise reasonable value. The exhibits also show the anticipated profits so that there is nothing now to be added, if Your Honors please, to the pleading or to the exhibits mathematically portraying this lineor's claims, nor in fact is anything lacking in proof.

If appellees say that we are suing on contract and cannot do this we can answer them that the reasonable price and reasonable profits are stated. If they say that we are not in a position to sue for reasonable value because we have used the term contract in the evidence and have asked for profits, we can say that this court has

full power to reform the instrument under the pleadings and the facts so that we may, without fear of technical difficulty, sue upon the contract. The contract is then not adopted in part only, but the contract is then adopted in full with all of its provisions as they would have been had the fraud not been committed.

We, however, submit that we are suing on a reasonable value and that the two items, one of $6,000 and one of $1,000 for profits are based upon the profits that would have been earned had the entire contract been completed. These are fixed items. If we are not entitled to them we must and readily do waive them.

We beg to cite the authorities submitted by Mr. Stiles:

Rem. & Bal. Sec. 1130.

Davis v. Thurston, 119 Wash. Dec. 265.

Burroughs v. School District (Wis.), 144 N. W. 977.

"Where performance, under the contract has advanced to a point where it may be determined from the contract what payment plaintiff is entitled to, for the work already done, his measure of recovery is properly the contract price for the part of the contract which has been performed, together with the profits which he has lost from being prevented from performing the remainder of the contract." 17 C. J. p. 858.

Attorneys Lien.

That appellant is entitled to have added to a judgment sought in this court an attorneys' fee commensurate with the amount and work involved. This subject is related to assignment of error number three.

We need only say that the lower court allowed an attorneys' fee of $500 for a recovery of about $4,000 and that in the event that recovery is made in addition in this court a fee commensurate with other fees allowed by the lower court should be granted.

Priorities.

Without referring to several assignments of error relating to this subject, we beg respectfully to submit that this appellant is entitled to full priority with other lien claimants as a material man, as an erector of that material in a second status, and as subcontractor in a third status. In other words, as to the $65,000 contract, the Millwork Company is solely a material man, as to the erection contract, if there is any preference to be given in such a position over a subcontractor, the Millwork Company is entitled to such preference on the $30,000 contract. It is a subcontractor as to the bank fixtures.

We sincerely submit there should be and can be no preference given the Bank or the receiver for the Building Company over this appellant's claims nor to anyone else similarly situated.

Summing up the entire controversy so far as

this appellant is affected by its various points of contact, we beg respectfully to submit in conclusion:

First—That there was absolute unity of purpose between the Bank and the Building Company, and its officers were either each of them aware of what was going on in both concerns, or were voluntarily leaving all duties to Larson and his assistant, Drury. That all the representations made by Larson and Drury were in the interest of erecting this building which was to belong to, and did belong to the Bank.

Second—That such representations were made in the interest of getting the building up, a thing the Bank desired. There was no hostility to the Bank in such representations and there was no interest adverse to the Bank in Larson and Drury in making these representations, and the Bank, therefore, is bound by all representations made, under the doctrine that Larson and Drury were acting as sole agents for both concerns, one the president of the Bank and a director in the Building Company, the other the president of the Building Company and chairman of the board of directors of the Bank.

Third—The representations were false and known to be false when made. The first representation was that they had a fund of $400,000 cash on hand with which to begin the building. The Building Company did not have a cent on hand when this representation was made.

The second representation was that they had a definite, final commitment for $600,000 as completion monies to be used solely for this building. They had no such commitment and knew they had not even complied with the tentative offer made by the Metropolitan Life Insurance Company, since individual bonds were required, which were never submitted and, in fact, never discussed with several of the prospective obligors.

Again Drury said to Davis, "This is a mutual thing if we fall down on our payments the law of the state is that your lien will revive," and by this third suggestion induced Davis, in conjunction with the assurances already given, to detach the rider reviving the lien if payments were not made.

The Bank stood by as the sole beneficiary of these promises and assurances, with full knowledge that they were being made. It is now seeking to destroy the $600,000 first mortgage, which was for completion monies, by claiming it has made some advances to the building on the faith of that mortgage. It definitely knew that the only other hope or source of money was the $400,000 of second mortgage bonds to be issued. If it has any rights for advances it must be relegated to an equity in such second mortgage, for that is the fund, as we now know, that the $400,000 was to arise from, a fact carefully kept from each and every contractor.

The Bank is seeking to foreclose a $70,000 mortgage, protection against which had been recorded in

the full warranty deed given by it to the Building Company. It controlled the Building Company and there was not the slightest excuse on its part, holding all of its stock, in not compelling the Building Company to execute and deliver these second mortgage bonds. They were due in four months and all that the bank needed to do was have them executed. It is now resting upon its own derelection, in not having these bonds constructed, in saying through Mr. Oakley's brief, that the Building Company had not fulfilled the agreement under the certificate for these bonds, and, therefore, the Bank need not fulfill its warranty. But intervening rights on the part of these lien claimants cannot thus be brushed aside. The Bank agreed to clear this property except for the $600,000 mortgage. When it did so, through the receiver or special deputy, it did what a court would compel it to do before it could have entrance into an equity court.

Taking the $600,000 mortgage; this was taken from the Building Company without any formal assent and pledged with the bank for such things as the advance of the $65,000 for the purchase of the Drury lot; for apparently the payment in full of the stock of the Building Company in the amount of $200,000, even for the interest on these amounts and for, as it is claimed, security for the very second mortgage bonds in the amount of $350,000. The demands by the Bank in this particular are, therefore, entirely outside of the contractural or

legal relations existing and formulated between the parties. At this junction we would like to adopt the authorities submitted by the attorney, Mr. Holt, of the Far West Clay Company on the subject of mortgages.

On the question of deliveries we simply say, in conclusion, that gross material, ordinary raw lumber for instance, can be sold again on the open market. That that is delivered, when there is room for it, it is naturally accorded a lien. Interior finishing, in fact most specially fabricated material, is useless for later deliveries. This fact is outstanding that it is ordinarily useless elsewhere and in larger cities it is impossible to deliver at or near the building any large quantity of finishing, terra cotta or structural steel. The lien must, therefore, arise with its fabrication and willingness to deliver it. No other doctrine will eke out the liberal intent of the lien act. Today the various lien claimants who are interested in this building would put up most strenuous objection to the taking of the finished material from the two warehouses and leaving it at nor near this open building, for they well know that it would lose its value in the course of a few short weeks of winter weather. This, alone, should answer the contention of each and all of those lien claimants who, in comfortable security of established liens, are seeking to have rejected this appellant's claim.

We respectfully submit, therefore, that we are

entitled to a reversal of the decree to the extent of our claim not allowed.

We are seeking the establishment of our values under the statute and not under the contract, but in determining those values we sincerely believe that the holding of the Supreme Court of the State of Washington entitles us to a lien for profits. If this court should hold with us on this particular we would be entitled to $69,507.83, with interest from January 15th, 1921, and in the event that this court should hold that we are not entitled to profit the two items, one of $6,000 and one of $1,000 would be deduced, and we would be entitled to $62,507.83, with interest and commensurate attorneys' fees and costs.

Respectfully submitted,

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